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A TREATISE
ON THE LAW AND PRACTICE OF
Foreclosing Mortgages

ON REAL PROPERTY, AND OF REMEDIES
COLLATERAL THERETO, WITH FORMS

BY
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WITH ADDITIONAL CHAPTERS ON
MORTGAGE REDEMPTIONS

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MORTGAGE FORECLOSURES.

CHAPTER XXVIII.

DELIVERING DEED—PASSING TITLE—OBTAINING POSSESSION.

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§ 680. General principles.—Immediately after the sale is concluded, if the purchaser pays the amount bid⁷⁰ and complies with the terms of sale, the officer who made the sale may execute and deliver to him a deed of the premises.⁷¹ It is not necessary to make a report of the sale, nor to have the report confirmed, before the deed is executed. It has been said that the referee's deed passes the title to the premises to the pur-

⁷⁰ It has been said that a sheriff is not liable for delivering a deed upon a sale under foreclosure without collecting the price bid by a junior mortgagee, where a prior mortgagee for the benefit of the mortgagor has purchased the decree

and has also purchased the claim of such junior mortgagee, but not the bid. *Russell v. Grimes*, 31 Neb. 784, 48 N. W. 905, aff'g on rehearing, 27 Neb. 812, 44 N. W. 107.

⁷¹ *Jackson v. Warren*, 32 Ill. 331.

chaser at the moment of its delivery, although the sale may not have been confirmed;⁷² but a legal title cannot vest under a deed until its delivery.⁷³

It has been said that the property is at the risk of the purchaser from the date of the delivery of the deed by the officer of the court, and that he cannot repudiate the contract, although the sale may afterwards be set aside for irregularity.⁷⁴ The person holding such a deed has been said to be *prima facie* the legal owner of the land described in it.⁷⁵ According to the English doctrine, a purchase at a foreclosure sale is not complete until the report of the officer making such sale has been confirmed; and the practice there is to withhold the deed until the entry of the final order of confirmation.⁷⁶

Where a deed is delivered before the sale is confirmed, the confirmation relates back to the date of the sale and gives effect to the deed from that time.⁷⁷ While the decisions in this country are not uniform, it is thought that the better practice is to report the sale and to have it confirmed before delivering the deed. Yet in those states where time is allowed for redemption after the sale, it is the practice to delay the report until the deed has been executed and delivered.⁷⁸ In such cases the mortgagor will waive all merely technical objections to the sale by failing to have it set aside before the time for redemption expires.⁷⁹

⁷² *Fort v. Burch*, 6 Barb. (N. Y.) 60. See *Mitchell v. Bartlett*, 51 N. Y. 447, aff'g 52 Barb. (N. Y.) 319; *Fuller v. VanGeesen*, 4 Hill N. Y.) 171; *Jones v. Burden*, 20 Ala. 382. See *ante*, chap. xxvii. for the New York practice, which requires the delivery of the deed before the confirmation of the sale.

⁷³ *Mitchell v. Bartlett*, 51 N. Y. 447.

⁷⁴ *Jones v. Burden*, 20 Ala. 382.

⁷⁵ *Jackson v. Warren*, 32 Ill. 331. See *Simerson v. Branch Bank at Decatur*, 12 Ala. 205.

⁷⁶ *Ex parte Minor*, 11 Ves. 559.

⁷⁷ *Lathrop v. Nelson*, 4 Dill. C. C. 194.

⁷⁸ *Walker v. Schum*, 42 Ill. 462. See also *Carroll v. Haigh*, 108 Ill. App. 264.

⁷⁹ *Fergus v. Woodworth*, 44 Ill. 374; *Walker v. Schum*, 42 Ill. 462.

§ 681. Provisions for letting purchaser into possession—**Rents.**—Where the decree in a foreclosure provides that the purchaser shall be let into possession upon producing the deed of the referee, or other officer making the sale, the purchaser does not acquire the title or the right the possession of the land, or to the rents and profits thereof, until the delivery of such deed;⁸⁰ up to the time of such delivery the owner of the equity of redemption is entitled to the possession and to the rents and profits of the land.⁸¹

Where mortgaged premises are sold under a decree of foreclosure, the owner of the equity of redemption will be entitled to the rents, issues and profits of the premises until the purchaser becomes entitled to possession; and where the rent is payable between the day of sale and the time when the purchaser will be entitled to the possession, such rent will belong to the owner of the equity of redemption, and not to the purchaser at the sale.⁸² But it has been held, where an assignee in bankruptcy of the mortgagor, by order of the bankrupt court, joined in the sale of the mortgaged premises under a power of sale contained in the mortgage, that the purchaser at such sale was entitled, as against the assignee in bankruptcy, to the rents and profits of the property sold for the period

⁸⁰ The New York court of appeals, in the case of *Farmers' Loan and Trust Company v. Bankers & Merchants Telegraph Company*, 119 N. Y. 15, 23 N. E. 173, 28 N. Y. S. R. 613, say that a judgment of foreclosure providing that the purchaser shall be entitled to the possession on the production of his deed, and that the mortgagor and their receiver shall join in the deed, necessarily implies that the referee shall give to the purchaser a deed, although not containing any express direction to that effect.

⁸¹ *Mitchell v. Bartlett*, 51 N. Y. 447, aff'g 52 Barb. 319; *Strong v. Dollner*, 2 Sandf. (N. Y.) 444. See *post*, §§ 713, 718.

⁸² *Cheney v. Woodruff*, 45 N. Y. 98; *Whalin v. White*, 25 N. Y. 462; *Miner v. Beekman*, 11 Abb. (N. Y.) Pr. N. S. 147, 42 How. (N. Y.) Pr. 33; *Astor v. Turner*, 11 Paige Ch. (N. Y.) 436, 43 Am. Dec. 766; *Clason v. Corley*, 5 Sandf. (N. Y.) 447; *Whitney v. Allen*, 21 Cal. 233. But see *McDevitt v. Sullivan*, 8 Cal. 592. See also *Peck v. Knickerbocker Ice Co.* 18 Hun (N. Y.) 183.

intervening between the day of sale and the day of the confirmation thereof by the bankrupt court.⁸³

Where a decree of foreclosure directs the sale of the premises, and that the purchaser at the sale be let into possession upon the delivery of the usual referee's deed, the purchaser will be entitled to a writ of assistance or other proper process of the court, requiring the delivery of the premises to him, as against all defendants who were served with the summons; this rule also prevails as against a defendant who is not mentioned in the decree by name, as well as against one whose name is not mentioned in the officer's deed.⁸⁴ Where the sale is consummated by the delivery of the deed, it passes the entire estate held by the mortgagor at the date of the mortgage as against all defendants.⁸⁵ The right of the purchaser to the possession of the premises under his deed, will not be affected by the fact that, pending the action, the plaintiff executed to one of the defendants a conveyance of the whole of the premises embraced in the decree.⁸⁶

§ 682. Effect and force of referee's deed.—It is provided by the Code,⁸⁷ that a conveyance upon a sale made pursuant to a final judgment in an action to foreclose a mortgage upon real property, vests in the purchaser the same estate only that would have vested in the mortgagee, if the equity of redemption had been foreclosed.⁸⁸ Such a conveyance is as valid as if it had been executed by the mortgagor and the mortgagee, and is an entire bar against each of them and against each party to the action who was duly summoned,⁸⁹ and against

⁸³ *Lathrop v. Nelson*, 4 Dill. C. C. 194.

⁸⁴ *Frisbie v. Fogarty*, 34 Cal. 11.

⁸⁵ *Montgomery v. Middlemiss*, 21 Cal. 103, 81 Am. Dec. 146; *Belloe v. Rogers*, 9 Cal. 125.

⁸⁶ *Montgomery v. Middlemiss*, 21 Cal. 103, 81 Am. Dec. 146. See *Richards v. Smith*, 88 Neb. 444, 129 N. W. 983.

⁸⁷ N. Y. Code Civ. Proc. § 1632. See also *Gruner v. Ruffner*, 134 App. Div. 837, 119 N. Y. Supp. 942.

⁸⁸ *Lawrence v. Delano*, 3 Sandf. (N. Y.) 333. See *Bishop v. Van Winkle*, 117 S. W. 345 (Ky.)

⁸⁹ In New York, although restitution is allowed in a proper case to a defendant who has not ap-

every person claiming from, through or under a party to the action, by title accruing after the filing of the notice of the pendency of the action,⁹⁰ The sale of the mortgaged premises and the confirmation thereof by the court, terminates the right of the owner of the equity of redemption to pay the debt and redeem the estate.⁹¹

The provision of the Code, declaring a conveyance an "entire bar," refers to rights and interests in the equity of redemption and not to interests paramount to the title of both the mortgagor and the mortgagee.⁹² Thus, where parties holding prior mortgages or liens are not made parties to a foreclosure, or if made parties and no purpose is indicated in the complaint to have the amount of their incumbrances ascertained and paid out of the proceeds of the sale, their prior liens will not be affected.⁹³ And a purchaser at a legal tax sale of land, upon which there was a mortgage at the time of such sale, will not be affected by a subsequent foreclosure of such mortgage and by a sale of the mortgaged premises, unless he is made a party to the foreclosure.⁹⁴

It is thought that the deed of a master in chancery, referee or other officer making the sale in mortgage foreclosure proceedings, executed to a third person, at the request of the real purchaser, vests the title to such land in such third person and his grantee, as against the real purchaser and his heirs.⁹⁵

peared but who has been served by publication, the title to property sold on foreclosure is not affected. N. Y. Code Civ. Proc. § 445. See also *Zarkowski v. Schroeder*, 71 App. Div. 526, 75 N. Y. Supp. 1021.

⁹⁰ N. Y. Code Civ. Proc. § 1632.

⁹¹ *Brown v. Frost*, 10 Paige Ch. (N. Y.) 243, 247.

⁹² *Rector v. Mack*, 93 N. Y. 488, 45 Am. Rep. 260. See *Smith v. Roberts*, 91 N. Y. 470; *Emigrant Industrial Savings Bank v. Goldman*, 75 N. Y. 127; *Rathbone v. Hooney*, 58 N. Y. 463; *Lewis v.*

Smith, 9 N. Y. 502, 61 Am. Dec. 706; *Fryer v. Rockefeller*, 4 Hun (N. Y.) 800. See N. Y. Code Civ. Proc. § 1632.

⁹³ *Bache v. Doscher*, 67 N. Y. 429, affirming 41 N. Y. Supr. Ct. (9 J. & S.) 150. See *Stanislaus Water Co. v. Bachman*, 152 Cal. 716, 15 L.R.A. (N.S.) 359, 93 Pac. 858. See *ante*, chap. ix.

⁹⁴ *Becker v. Howard*, 66 N. Y. 5, affirming 4 Hun (N. Y.) 359.

⁹⁵ *Robertson v. Sayre*, 53 Hun (N. Y.) 490, 25 N. Y. S. R. 449, 6 N. Y. Supp. 649.

The supreme court of Missouri, in the case of *Dodson v. Lomax*,⁹⁶ say that the inclusion in a sheriff's deed upon foreclosure of a school mortgage, of a lot included in the mortgage, but not sold, is a mistake which will be corrected in equity, where the sheriff was ignorant and the purchaser cognizant thereof.

§ 683. Estate conveyed and interests passed by referee's deed.—A purchaser at a mortgage foreclosure sale acquires all the title and interest of both the mortgagor and the mortgagee in and to the property.⁹⁷ The court undertakes to

The New Jersey Acts of 1881 and 1882, Supp. Rev. 489, 490, which subject mortgaged estates to conditions of redemption in the hands of purchasers at foreclosure sales, being unconstitutional as applied to antecedent mortgages, the purchaser at a sale under proceedings for the foreclosure of a mortgage made prior to these Acts took the estate of the mortgagee unaffected by the conditions of redemption created by those Acts, although at the foreclosure sale, enough was realized to pay the prior mortgage in full, and a small sum upon a second mortgage, which was made after these Acts took effect. Champion v. Hinkle, 45 N. J. Eq. (18 Stew.) 162, 16 Atl. 70, 12 N. J. L. J. 87.

⁹⁶ 21 S. W. 25.

⁹⁷ *Rector v. Mack*, 93 N. Y. 488, 45 Am. Rep. 260. See *Westbrook v. Gleason*, 79 N. Y. 23; *Slattery v. Schwannecke*, 44 Hun (N. Y.) 75; *McMillan v. Richards*, 9 Cal. 365, 70 Am. Dec. 655; *Taylor v. Kearns*, 68 Ill. 339; *Hamilton v. State*, 1 Ind. 128; *Poweshiek County v. Denison*, 36 Iowa, 244, 14 Am. Rep. 521; *Brown v. Tyler*, 74 Mass. (8

Gray) 135, 69 Am. Dec. 239; *Young v. Brand*, 15 Neb. 601; *Carter v. Walker*, 2 Ohio St. 339. The purchaser at a foreclosure sale acquires the rights of the mortgagee, so far as he has any claim or interest in the premises for the security of his debt, and also so much of the equity of redemption as is not bound by the lien of a senior incumbrance. *Watson v. Dundee Mortgage and Trust Investment Co.* 12 Oreg. 474. See *Sellwood v. Gray*, 11 Oreg. 535, *Ames v. Storer*, 98 Wis. 372, 67 Am. St. Rep. 813, 74 N. W. 101; *Leet v. Armbruster*, 143 Cal. 663, 77 Pac. 653; *Thompson v. Bender*, 51 Tex. Civ. App. 81, 111 S. W. 170; *Lone Jack Mining Co. v. Megginson*, 82 Fed. 89. See also *Alexander v. Grover*, 190 Mass. 462, 77 N. E. 487; *Gamble v. Caldwell*, 98 Ala. 577, 12 So. 424; *Martinez v. Lindsay*, 91 Ala. 334, 8 So. 787; *Bryan v. Pinney*, 3 Ariz. 412, 31 Pac. 548; *Clyne v. Benicia Water Co.* 100 Cal. 310, 34 Pac. 714; *Robinson v. Thornton*, 102 Cal. 675, 34 Pac. 120; *Thorpe v. Kerns*, 83 Cal. 553, 20 Pac. 82, 23 Id. 691; *Barnard v. Wilson*, 74 Cal. 512, 16

dispose of the interests of the parties to the suit in the land,

Pac. 307; *Myers v. Pierce*, 86 Ga. 786, 12 S. E. 978; *Duesterberg v. Swartzel*, 115 Ind. 180, 17 N. E. 155; *Austin v. Bowman*, 81 Iowa, 277, 46 N. W. 1111; *Leavenworth Lodge, No. 2, I. O. O. F. v. Byers*, 54 Kan. 323, 38 Pac. 261; *Bailey v. Fanning Orphan School* (Ky.) 14 S. W. 908, 12 Ky. L. Rep. 644; *Landreaux v. Louque*, 43 La. An. 234, 9 So. 32; *Herman v. Fanning*, 151 Mass. 1, 23 N. E. 493; *Chapin v. Freeland*, 142 Mass. 383, 56 Am. Rep. 701, 8 N. E. 128; *Mority v. St. Paul*, 52 Minn. 409, 54 N. W. 380; *Jellison v. Holloran*, 44 Minn. 199, 46 N. W. 332; *Alkinson v. Greaves*, 70 Miss. 42, 11 So. 688; *Lanier v. McIntosh*, 117 Mo. 508, 38 Am. St. Rep. 676, 23 S. W. 787; *Meier v. Meier*, 105 Mo. 411, 16 S. W. 223; *Dodge v. Omaha & S. W. R. Co.* 20 Neb. 226, 29 N. W. 936; *Henninger v. Herald*, 53 N. J. Eq. (8 Dick.) 674, 29 Atl. 190; *Champion v. Hinkle*, 45 N. J. Eq. (18 Stew.) 162, 16 Atl. 701; *Melick v. Pidcock*, 44 N. J. Eq. (17 Stew.) 525, 15 Atl. 3, 6 Am. St. Rep. 901; *Baldwin v. Howell*, 45 N. J. Eq. (18 Stew.) 519, 15 Atl. 236; *Mount v. Manhattan Co.* 43 N. J. Eq. 25, 9 Atl. 114; *Hiles v. Fisher*, 144 N. Y. 306, 39 N. E. 337, 63 N. Y. S. R. 705, 43 Am. St. Rep. 762, 30 L.R.A. 305; *Townsend v. Thomson*, 139 N. Y. 152, 34 N. E. 871; *Slattery v. Schwabenecker*, 44 Hun (N. Y.) 75; *Moggats v. Coe*, 44 Hun (N. Y.) 31; *Hartley v. Meyer*, 2 Misc. 56, 20 N. Y. Supp. 351, 49 N. Y. S. R. 351; *Bainfort County Lumber Co. v. Dail*, 111 N. C. 120, 15 S. E. 941,

rehearing denied 112 N. C. 350, 15 S. E. 350, 17 S. E. 587; *Gill v. Weston*, 110 Pa. St. 312, 1 Atl. 921; *Dyer v. Cranston Print Works Co.* 17 R. I. 774, 24 Atl. 827; *Ex parte Boyce*, 41 S. C. 201, 19 S. E. 495; *Givins v. Carroll*, 40 S. C. 413, 42 Am. St. Rep. 889, 18 S. E. 1030; *Kirber v. Moody*, 84 Tex. 201, 19 S. W. 453; *Ryan v. Ferguson*, 3 Wash. 356, 28 Pac. 910; *Osborn v. Glasscock*, 39 W. Va. 749, 20 S. E. 702.

The purchaser of the title of lands sold by virtue of an execution issued upon a decree in an action for the foreclosure of a mortgage takes all the title which the mortgagor had and which was conveyed by such mortgage (*Henninger v. Herald*, 51 N. J. Eq. (6 Dick.) 74, 29 Atl. 190), and of the wife who unites in the mortgage, subject to the rights of each to redeem and to the right of the mortgagor to retain possession for one year from the sale (*Duesterberg v. Swartzel*, 115 Ind. 180, 17 N. E. 155), and may recover damages for the breach of the covenant of warranty contained in the deed conveying the property to the mortgagor. *Mygatt v. Coe*, 44 Hun (N. Y.) 31.

A purchaser of real property at sheriff's sale under *feri facias* in foreclosure of a special mortgage can take nothing not described in the mortgage (*Jones v. Lake*, 43 La. An. 1024, 10 So. 204), and the title created by a deed expressly made subordinate to a prior trust deed is extinguished by a sale under the

and the purchaser acquires those interests whatever they may

latter deed. *Meier v. Meier*, 105 Mo. 411, 16 S. W. 223.

A channel or pipe through which water has been furnished to a ranch, for more than five years, from the mains of a water company, pursuant to an agreement to furnish the same in consideration of certain water rights, constitutes an appurtenance to the ranch; and the right to it, including the flow of water from the main, passes to a purchaser of the ranch upon a foreclosure sale. *Clyne v. Benicia Water Co.* 100 Cal. 310, 34 Pac. 714.

A purchase from one against whom a remedy is barred by time entitles the purchaser to stand in as good a position as his vendor. Hence a purchaser at a foreclosure sale of the premises will be protected by the statute. *Chapin v. Free-land*, 142 Mass. 383, 56 Am. Rep. 701, 8 N. E. 128.

Acquires mortgage interest only where.—It has been said that one who purchases real property at a foreclosure sale, under an agreement that the title shall vest in him for the purpose of executing a mortgage to one paying part of the purchase money, and as security for the repayment of money advanced by himself, and to convey the premises to another, acquires only a mortgage interest as against the latter. *Van Vleck v. Enos*, 88 Hun (N. Y.) 348, 34 N. Y. Supp. 754.

An assignee of a mortgage of desert lands made after final proof but before patent, who has purchased the lands upon foreclosure sale, is entitled to file a petition to revive the original judgment on foreclosure, under Idaho Rev. Stat.

§ 4498, providing for such action by the purchaser of property at a sheriff's sale, who fails to recover possession by reason of irregularities or because the property was not subject to execution and sale, where the entry of the mortgagor is cancelled by the land office in proceedings begun before the sale. *Cantwell v. McPherson*, 2 Idaho, 1044, 29 Pac. 102.

Cannot be limited to life estate by schedule of bankrupt.—It is thought that in those cases where the title conveyed by a trust deed of land, the grantor's whole interest in which was afterwards sold under a decree on a joint petition of the trustee and the mortgagor's assignee in bankruptcy, cannot be limited to a life estate by a statement in the grantor's schedule or in his assignee's original separate petition, that his interest was that of a life estate. *Alkinson v. Greaves*, 70 Miss. 42, 11 So. 688.

Fee in equity of redemption.—The purchaser of mortgaged premises conveyed in trust, at a sale in a foreclosure suit to which the *cestuis que trust* were parties, acquires the estate of the mortgagor and also the fee in the equity of redemption. *Melick v. Pidcock*, 44 N. J. Eq. (17 Stew.) 525, 6 Am. St. Rep. 901, 15 Atl. 3.

Mistake of clerk of court.—Effect on purchaser's title and estate.—The title of a purchaser at a foreclosure sale of lands is not affected by a mistake of the clerk of the court (which was corrected on motion) in entering in the draft of the judgment on the order book the figures \$200 instead of \$2,000, for which

be.⁹⁸ And it has been said that a sheriff's sale of real estate, under a judgment recovered by a *scire facias* upon a mortgage, passes to the purchaser the title to the mortgaged premises discharged of all equities,—even of those of which the mortgagee had no notice or knowledge.⁹⁹

the lands were actually sold. *Vissman v. Bryant*, 14 Ky. L. Rep. 874, 21 S. W. 759.

In *New Jersey* the title to lands acquired under foreclosure of a mortgage to the sinking fund commissioners of the State of New Jersey is superior to that of a purchaser under a sale made under the "Martin Act" for taxes, some of which became a lien prior and others subsequent to the date of the mortgage, the tax sale being made to satisfy the combined taxes. *Pugh v. Sinking Fund Comrs.* 53 N. J. L. (24 Vr.) 629, 23 Atl. 270.

One who has no title, legal or equitable, to a tract of land, cannot by acts *in pais* confirm the sale of any interest therein made under a decree in chancery; and even a purchaser of the equity of redemption thereof, pending a suit by one claiming title through such sale, is not affected by the acts *in pais* of such stranger to the title. *Brooks v. Kelly*, 63 Miss. 616. And where a man who had taken the title to property in which he had only a one-third interest gave a purchase-money mortgage upon it, and afterwards, upon payment of one-third of the price, obtained a release of an undivided one-third, his interest in that third becomes absolute upon subsequent foreclosure expressly excepting the part released to him. The purchaser at the sale obtains no interest in that third; and deeds to him from the persons originally entitled to the other two-thirds are

of no effect. *Central Bank v. Early*, 10 Sadler (Pa.) 526, 14 Atl. 427.

In a case where land was conveyed to the trustee to secure debts, and afterwards a third party took a conveyance of the equity of redemption, and paid off the debts, and then sold the land to a person who took possession. The first vendee then caused the trustee to sell the land under the terms of the deed in order to get the legal title out of him, and the court held that the purchaser at such sale with full notice of the facts, got no title, and no estoppel arose against the owner of the equity. *Mayo v. Leggett*, 96 N. C. 237, 1 S. E. 622.

⁹⁸ *Leech v. Hillsman*, 8 Lea (Tenn.) 747; *Zollman v. Moore*, 21 Gratt. (Va.) 313; *Tallman v. Ely*, 6 Wis. 244; *Gillett v. Eaton*, 6 Wis. 30; *Heinroth v. Frost*, 250 Ill. 102, 95 N. E. 65; *Watson v. Jones*, 41 Fla. 241, 25 So. 678; *Arterburn v. Beard*, 86 Neb. 733, 126 N. W. 379; *Currier v. Teske*, 84 Neb. 60, 133 Am. St. Rep. 602, 120 N. W. 1015; *Kerr v. McCreary*, 84 Neb. 315, 120 N. W. 1117; *People's Trust Co. v. Tonkonogy*, 144 App. Div. 333, 128 N. Y. Supp. 1055; *Wimpfheimer v. Prudential Ins. Co. of America*, 56 N. J. Eq. 585, 39 Atl. 916; *Hart v. Beardsley*, 67 Neb. 145, 93 N. W. 423. See *Bushey v. National State Bank of Camden*, 72 N. J. Eq. 466, 66 Atl. 592.

⁹⁹ *Landell's Appeal*, 105 Pa. St. 152. A foreclosure deed to the mortgagee gives him the same es-

The purchaser takes the title of the mortgagor and the mortgagee as it existed at the time of the execution of the mortgage, subject to all its qualifications,¹ because the vendee of mortgaged premises under a sheriff's deed stands upon the equities of the mortgagee.² Easements used by the mortgagor pass under a sheriff's deed as an appurtenance.³ But a deed cannot pass a greater interest than that which is authorized by the judgment, although by its terms it may include premises mentioned in the mortgage, but which were subsequently released by the mortgagee from the lien thereof.⁴

If his title was a mere equity or a right to own the property upon the payment of the purchase price, such interest is all that can be transferred by the foreclosure.⁵ If the mortgage was upon a lease for a term of years, the purchaser be-

tate as the foreclosure of the equity of redemption, and is as effectual against the owner of the equity as if he executed such deed. *Ruggles v. First Nat. Bank of Centreville*, 43 Mich. 192.

¹ *Vroom v. Ditmas*, 4 Paige Ch. (N. Y.) 526, 531; *McMillan v. Richards*, 9 Cal. 365, 70 Am. Dec. 655; *Taylor v. Kearn*, 68 Ill. 339; *Hamilton v. State*, 1 Ind. 128; *Poweshiek County v. Dennison*, 36 Iowa, 244, 14 Am. Rep. 521; *Mars-ton v. Marston*, 45 Me. 412; *Haynes v. Wellington*, 25 Me. 458; *Brown v. Tyler*, 74 Mass. (8 Gray) 135, 69 Am. Dec. 239; *Ritger v. Parker*, 62 Mass. (8 Cush.) 145, 54 Am. Dec. 744; *Carter v. Walker*, 2 Ohio St. 339; *Frische v. Kramer*, 16 Ohio, 125, 47 Am. Dec. 368; *De-Haven v. Landell*, 31 Pa. St. 120; *West Branch Bank v. Chester*, 11 Pa. St. 282, 51 Am. Dec. 547; *Hod-son v. Treat*, 7 Wis. 263. See *Reid v. Town of Long Lake*, 44 Misc. 370, 89 N. Y. Supp. 993; *Common-*

wealth Mortgage Co. v. De Waltoff, 135 App. Div. 33, 119 N. Y. Supp. 781; *Gilchrist v. Foxen*, 95 Wis. 428, 70 N. W. 585; *Kilgour v. Scott*, 101 Fed. 359. See also *Sheridan v. Schimpf*, 120 Ala. 475, 24 So. 940.

But see *New York Water Co. v. Crow*, 110 App. Div. 32, 96 N. Y. Supp. 899, where the mortgage covered after acquired property.

² *Berryhill v. Kirchner*, 96 Pa. St. 489.

³ *Johnson, as trustee, etc. v. Sherman County Irrigation, Water Power & Improvement Co.* 71 Neb. 452, 98 N. W. 1096; *Richmond v. Bennett*, 205 Pa. 470, 55 Atl. 17; *Stanislaus Water Co. v. Bachman*, 152 Cal. 716, 15 L.R.A. (N.S.) 359, 93 Pac. 858. See also *Dahlberg v. Haeberle*, 71 N. J. Law, 514, 59 Atl. 92.

⁴ *Laverty v. Moore*, 32 Barb. (N. Y.) 347, affirmed 33 N. Y. 658.

⁵ *Stewart v. Hutchinson*, 29 How. (N. Y.) Pr. 181.

comes the assignee of the lease.⁶ If the property has been previously sold by the mortgagor upon contract, and his vendee is in possession, the purchaser will take the position of the mortgagor as to the vendee; and upon default in the payment of the money due upon the contract, he may turn him out of possession.⁷

And where persons holding prior liens are not made parties to the action, or, if made parties, no purpose is indicated in the complaint to have their liens ascertained and paid out of the proceeds of the sale, their rights will not be cut off.⁸

A purchaser under a foreclosure decree acquires no interest as against an owner of the fee who was not made a party,⁹ and a commissioner's deed on a foreclosure sale cannot increase the rights originally granted by the mortgage; nor can the owner of the equity of redemption and other parties to the foreclosure stipulate away the rights of the heirs or legal representatives of the deceased mortgagor.¹⁰

It is thought that a purchaser at a foreclosure sale is not fixed with constructive notice of an assignment of the equity of redemption in any of the mortgaged property by any of the successive holders of the mortgage, nor is he bound to

⁶ *Kearney v. Post*, 1 Sandf. (N. Y.) 105.

⁷ *Chute v. Noris*, 31 Barb. (N. Y.) 511. See *Smith v. Roberts*, 91 N. Y. 470; *Emigrant Industrial Savings Bank v. Goldman*, 75 N. Y. 127; *Rathbone v. Hooney*, 58 N. Y. 463; *Lewis v. Smith*, 9 N. Y. 502, 61 Am. Dec. 706; *Dwight v. Phillips*, 48 Barb. (N. Y.) 116.

⁸ *Emigrant Industrial Savings Bank v. Goldman*, 75 N. Y. 127; *Bache v. Doscher*, 67 N. Y. 429, affirming 41 N. Y. Supr. Ct. (9 J. & S.) 150; *Becker v. Howard*, 66 N. Y. 5, affirming 4 Hun (N. Y.) 359; *Walsh v. Rutger's Fire Insurance Co.* 13 Abb. (N. Y.) Pr. 33.

See *Watson v. Jones*, 41 Fla. 241, 25 So. 678; *Western Iron Works v. Montana Pulp & Paper Co.* 30 Mont. 550, 77 Pac. 413. See *ante*, chap. ix.

⁹ *Fowler v. Lilly*, 122 Ind. 279, 23 N. E. 767; *Watts v. Julian*, 122 Ind. 124, 23 N. E. 698.

But the purchaser in that event becomes an assignee of the lien and may foreclose it. *Stough v. Badger Lumber Co.* 70 Kan. 713, 79 Pac. 737.

¹⁰ *Morgan v. Meuth*, 60 Mich. 238, 27 N. W. 509.

inquire in regard to it; but all that he is required to do is to ascertain from the record or by inquiring of the mortgagor whether the debt has been paid or the mortgage released.¹¹ A mortgagor of lands in fee, who had previously conveyed a small piece of the land upon condition that the grantee would erect and maintain a well, with tank, and do other specified things, is estopped, as against the mortgagee, from denying that the latter, who purchased at the foreclosure, is entitled to the whole lot, where, after the well and tank were constructed, it was closed and the tank removed, and the grantee ceased to occupy the land conveyed.¹² Neither can an owner of land on both sides of a stream, subject to a mortgage upon the land upon one side of the stream, which includes the right to half the water, by raising the dam and diverting the whole of the water to uses upon the other side, and thus prevent a purchaser upon a sale under the foreclosure of the mortgage from acquiring a right to half the water.¹³ From what has been said above it follows as a corollary that the purchaser at a foreclosure sale of the undivided interest of a tenant in common in lands takes an undivided interest in every part of the premises, and does not become sole owner of any definite subdivision thereof.¹⁴ In short, the purchaser at a mortgage foreclosure sale becomes the absolute owner of the premises in fee simple, where the mortgagor had such an estate in the property. A great many questions relative to the rights and interests of such purchaser have been discussed and decided by the courts in recent years. For convenience of collation they have been divided into groups, and those groups here follow arranged in as nearly alphabetical order as is practicable.

¹¹ *Beaufort County Lumber Co. v. Dail*, 112 N. C. 941, 17 S. E. 527, 112 N. C. 350, denying rehearing in 111 N. C. 120, 15 S. E. 941. See also *Pinney v. Merchants' National Bank*, 71 Ohio St. 173, 72 N. E. 884.

¹² *Trope v. Kerns*, 83 Cal. 553, 20 Pac. 82, 23 Pac. 691.

¹³ *Dyer v. Cranston Print Works Co.* 17 R. I. 774, 24 Atl. 827.

¹⁴ *Myers v. Pierce*, 86 Ga. 786, 12 S. E. 978.

§ 684. **Same—Assessments—Condemnation and damage funds.**—Where there has been a payment, under a decree by a referee in foreclosure, of a local assessment which is an apparent lien upon the mortgaged premises, out of the proceeds of the mortgage sale, is equivalent to a payment by the owner of the equity of redemption, and will entitle such owner, on the subsequent vacating of the assessment, to recover from the municipality the amount so paid.¹⁵ It has been said that the foreclosure of mortgages upon land does not pass the title to a fund arising from a prior condemnation of a water right appurtenant to the land, or change the manner of distribution.¹⁶ But it seems that a mortgagee who purchases the mortgaged premises at foreclosure sale for the full amount of the mortgage debt is entitled, after the expiration of the time for redemption, without redemption having been made, to the damages awarded for a street improvement, the assessment for which was made after the foreclosure sale, although the proceedings were instituted before the foreclosure.¹⁷

§ 685. **Same—Assignee of mortgagee—Purchaser.**—It is thought that a purchaser in good faith and for value from a mortgagee who, upon an attempted foreclosure and sale bid in the property, becomes the assignee of the mortgage, where the decree was a nullity, and his possession is that of a mortgagee in possession after condition broken, which he is entitled to retain as against heirs of the mortgagor or their

¹⁵ *Brehm v. Mayor, etc. New York*, 104 N. Y. 186, 10 N. E. 158.

¹⁶ *Re Rochester*, 136 N. Y. 83, 32 N. E. 702, 19 L.R.A. 161, 49 N. Y. S. R. 86. See *Miller v. Board of Miss. Levee Com'rs*, 78 Miss. 201, 28 So. 834; *Matter of Washington Ave.* 34 Misc. 655, 70 N. Y. Supp. 599.

Attorney's lien upon an award in

condemnation proceedings is superior to the rights of the grantee of the purchaser at a sale under a subsequent foreclosure of a mortgage on the property. *Gates v. De La Mare*, 49 N. Y. S. R. 775, 20 N. Y. Supp. 837.

¹⁷ *Moritz v. St. Paul*, 52 Minn. 409, 54 N. W. 370.

grantee.¹⁸ But it would seem that the assignees of a purchaser at a mortgage sale void as being made under a judgment obtained by the mortgagee against himself as administrator of the mortgagor, though not chargeable by the identity of the name with notice that the mortgagee and administrator were the same person, and of the consequent invalidity of the judgment, acquire no title as against the heirs of the mortgagor, in the absence of any act or failure on the part of the latter creating an estoppel.¹⁹

Where a mortgagee buys the land at the sale, having previously quit-claimed his interest to a third person, he becomes trustee of the land for his grantee.²⁰

§ 686. **Same—Bona fide purchaser.**—It has been said that the title of a *bona fide purchaser* for value without notice on a mortgage sale is not affected by the fact that the holder of the mortgage had prevented a tender by refusing to accept payment, except on conditions which he had no right to make.²¹ And the possession of a *bona fide* grantee of a purchaser at a void foreclosure sale having continued after the expiration of the time of redemption, his title becomes absolute; and his subsequent failure to keep up his improvements, or to cultivate or occupy the premises, will not affect his right to the land or the possession.²²

It is held by the supreme judicial court of Massachusetts, in *Hermans v. Fanning*,²³ that in a case where the insurance on mortgaged premises is paid to the mortgagee on receipts from him and also from the owner of the equity of redemption, who is induced to sign a receipt by an assignment of the

¹⁸ *Bryan v. Pinney*, 3 Ariz. 412, 31 Pac. 548. See *Jones v. Standiford*, 69 Kan. 513, 77 Pac. 271.

¹⁹ *Bryan v. Pinney*, 3 Ariz. 412, 31 Pac. 548.

²⁰ *Gottlieb v. City of New York*, 128 App. Div. 148, 112 N. Y. Supp. 545.

²¹ *Holland v. Citizens' Sav. Bank*, 16 R. I. 734, 19 Atl. 654, 8 L.R.A. 553.

²² *Jellison v. Holloran*, 44 Minn. 199, 46 N. W. 332.

²³ 151 Mass. 1, 23 N. E. 493.

mortgage to his brother, he himself paying the balance due on the mortgage, and his brother subsequently assigns the mortgage to one who enters and sells the lands under a power of sale in the mortgage,—a *bona fide* purchaser at the sale acquires a good title as against a purchaser from the owner of the equity of redemption.

A purchaser at a foreclosure sale who has not parted with consideration is not deemed a *bona fide* purchaser.²⁴ The doctrine of *caveat emptor* applies to a foreclosure sale.²⁵

§ 687. Same—Community property.—The doctrine of community property, we have already seen,²⁶ prevails in many of the states, carved out of the territory acquired by the “Louisiana Purchase,” in which the civil law, instead of the common law, forms the basis of the judicial system. It is said that a sale of community property upon foreclosure of a special mortgage held by a community creditor, evidenced by an authentic act importing a confession of judgment and containing the non-alienation clause, will convey a valid title to a purchaser, although foreclosed in executory proceedings against the surviving husband alone.²⁷ And in Washington, upon a sale, under a decree of the court, of mortgaged community property under the statute,²⁸ the community title is sold; and the execution of a deed purporting to convey only the right of the deceased member of the community therein

²⁴ *Richardson v. Stephens*, 122 Ala. 301, 25 So. 39. For other cases where the purchaser was held not to be a *bona fide* purchaser, see *Ellis v. Allen*, 99 Wis. 598, 75 N. W. 949; *Connolly's Ex'r v. Beckett*, 105 S. W. 446 (Ky.); *Gewin v. Shields*, 167 Ala. 593, 52 So. 887.

²⁵ *Watson v. Jones*, 41 Fla. 241, 25 So. 678; *Fidelity Insurance, Trust & Safe-Deposit Co. v. Roanoke Iron Co.* 84 Fed. 744; *Nor-*

ton v. Taylor, 35 Neb. 466, 18 L.R.A. 88, 37 Am. St. Rep. 441, 53 N. W. 418; *Louisville & Nashville R. R. Co. v. Illinois Central R. R. Co.* 174 Ill. 448, 51 N. E. 824; *Crawford v. Foreman*, 127 Iowa, 661, 103 N. W. 1000. See *Cooper v. Ryan*, 73 Ark. 37, 83 S. W. 328.

²⁶ See *ante*, § 628.

²⁷ *Landreaux v. Lougue*, 43 La. Ann. 234, 9 So. 32.

²⁸ Wash. Code, 1881, § 1524.

will not deprive the purchaser of his right to the entire premises.²⁹

§ 688. Same—Error and fraud.—The general rule is that a purchaser in good faith and for value of land at a foreclosure sale, cannot be divested of title, even though gross error and fraud by others, intervened in the procurement of the decree and sale.³⁰

§ 689. Same—Emblements and ice.—A purchaser at a foreclosure sale acquiring the title in fee simple, is entitled to

²⁹ *Ryan v. Ferguson*, 3 Wash. 356, 28 Pac. 910.

³⁰ *Swift v. Yanaway*, 153 Ill. 197, 38 N. E. 580. In this case it was insisted that there was collusion and fraud between Henderson, the then guardian of the plaintiffs in error, and one Gilfillin, in procuring the decree of foreclosure. The court say:

"It is a fundamental doctrine that fraud will not be presumed, but must be proved. True, fraud can rarely be established by direct evidence, and must, ordinarily be proved by facts and circumstances shown which raise the inference that fraud was perpetrated * * * The bare fact that the record discloses that, by agreement of the guardian and Gilfillin, the decree was to be rendered for \$500, to be paid in installments of \$300 and \$200, is, in view of the facts shown, insufficient to raise the inference that it was fraudulently done. If entitled to the decree foreclosing the deed as a mortgage, to which the court found he was entitled, no reason is apparent why Gilfillin should not have obtained a decree for the full amount of his allow-

ance by the county court of Cumberland county. That he consented to take a decree for less rather rebuts than raises an inference that he sought to overreach, or obtain an unconscionable advantage, in that proceeding. It is sufficient to say, upon the whole record, it does not appear that fraud, such as ought, under the rules of chancery practice, to impeach or set aside the decree, is shown. More especially must this be held in view of the fact that the defendant in error, Yanaway, so far as appears by this record, was a *bona fide* purchaser at the sale subsequently made under such decree. There is, we think, a total failure to connect him with any fraud or collusion in the procurement of the decree, or in making the sale thereunder. Yanaway being, as we hold, a purchaser of said eighty-acre tract of land, in good faith and for value, cannot be disturbed, or divested of his title, even though gross error and fraud by others, intervened in the procurement of the decree and sale, *Sibert v. Throop*, 77 Ill. 43; *Wadhams v. Gay*, 73 Ill. 415."

have and receive all the rights and privileges going therewith. This includes, of course, a right to the emblements;³¹ but where crops and emblements have been severed before the completion of the sale and delivery of the deed, they cease to be a part of the realty and do not pass therewith.³²

Ice upon ponds and streams is in the nature of an emblement.³³ So long as it remains in its original state and attached to the land at the banks of the stream or pond, it is real property³⁴ and passes by a conveyance of the land; but when the ice has been severed and harvested, it becomes personal property, and does not pass with the land. Thus it has been said that a mortgagee who becomes the purchaser on foreclosure is not entitled to ice cut by a lessee of the mortgagor before foreclosure, although the house in which it was stored, the land on which the house was situated and the pond from which the ice was cut, were all sold under the mortgage.³⁵ Hence a mortgagee and purchaser on foreclosure sale of ice houses and of the right to cut ice from a pond does not acquire title to ice cut and stored in the ice houses by the lessee of the mortgagor prior to the foreclosure sale.³⁶

§ 690. Same—General creditors of Mortgagor.—The general rule is that assets derived from the sale of mortgaged premises on the foreclosure of the mortgage become, as regards creditors, the substitute for the property sold, and the claims of creditors are transferred by the sale to the funds derived from such sales, and the purchaser takes the land freed from the claims of general creditors.³⁷ Such sale will

³¹ See *post*, § 717, also 1 Kerr on Real Prop. § 50.

³² See 1 Kerr on Real Prop. §§ 71-73.

³³ The "great ponds" of Massachusetts and other states are an exception to the rule. The ice upon these belongs by custom and statute

to the first comer each season. See 1 Kerr on Real Prop. § 74.

³⁴ See 1 Kerr on Real Prop. § 68.

³⁵ *Gregory v. Rosenkrans*, 72 Wis. 220, 1 L.R.A. 176, 39 N. W. 378.

³⁶ *Gregory v. Rosenkraus*, 78 Wis. 451, 47 N. W. 832.

³⁷ *Vilas v. Page*, 106 N. Y. 439,

prevent a subsequent levy of attachment against the debtor from having any effect, although the deed is not given until subsequent to the attachment.³⁸ Consequently the purchaser at a mortgage sale is not bound by an action against the mortgagor involving the title to the premise or by notice of its pendency, where he is not seasonably brought in as a party, and the mortgagees are not made parties until after the foreclosure.³⁹

Sale on the foreclosure of a mortgage which is a prior and paramount lien will pass the title to the land free from a subsequent judgment lien, unless the land was redeemed from the foreclosure sale.⁴⁰ And it has been said that purchasers claiming title under the assignee of a mortgage executed prior to a judgment against the mortgagor, and who were *bona fide* purchasers for value without notice other than the judgment and execution thereon, hold by a title superior to that of a purchaser at a sale upon execution under the subsequent judgment.⁴¹

§ 691. **Same—Invalid mortgage.**—A mortgage which is invalid for any reason, carries with it no interest or rights, and a purchaser on foreclosure will acquire no title to the land sold.⁴² Thus it has been said that on the foreclosure of a mortgage given by a married woman and her husband upon property devised to her, to her sole and separate use free from the interference or control of her husband, and to her heirs and assigns forever, with no further provision in regard to alienation by her, the purchaser gets no title thereunder, since the mortgage is void, and a judgment thereon is also void.⁴³

13 N. E. 743. See *Chicago, R. I. & P. R. Co. v. Howard*, 74 U. S. (7 Wall.) 392, 19 L. ed. 117.

³⁸ *Robinson v. Thornton*, 102 Cal. 675, 34 Pac. 120.

³⁹ *Hokanson v. Gudenson*, 54 Minn 499, 40 Am. St. Rep. 334, 56 N. W. 172.

⁴⁰ *Austin v. Bowman*, 81 Iowa, 277, 46 N. W. 1111.

⁴¹ *Martinez v. Lindsay*, 91 Ala. 334, 8 So. 787.

⁴² *Richardson v. Stephens*, 122 Ala. 301, 25 So. 39. See *Way v. Scott*, 118 Iowa, 197, 91 N. W. 1034.

⁴³ *Hays v. Leonard*, 10 Pa. Co. Ct. 648.

And where a widow gives a mortgage of the fee upon a lot in which she held a life estate only under her husband's will, although for thirty years she held it under the mistaken impression that she owned the fee, a sale conveys no title to the purchaser at a foreclosure sale made shortly after her death.⁴⁴

But in those states in which the civil law doctrine of community property prevails,⁴⁵ where a widow gives a deed of trust upon lands purchased by the husband during their marriage with his separate means, to secure moneys advanced to her, containing nothing to show that they were not community property, and without notice that the lands were the separate estate of the husband, upon sale under the trust deed the purchaser acquires a superior title to half the land as against the heirs of the husband.⁴⁶

§ 692. Same—Irregularities and defects.—Irregularities and defects in the execution of the mortgage or trust deed, in the obtaining of a decree and order of sale, and in selling the property thereunder, may or may not prevent the purchaser at such sale from taking title. All depends upon the character and seriousness of the irregularities and defects. It is thought that a purchaser at a foreclosure sale takes title notwithstanding defects in proceedings upon which the judgment was obtained, so long as the judgment is not in itself void.⁴⁷ But land included in the judgment which was not set forth in the complaint, will not pass to the purchaser on the

⁴⁴ *Mixter v. Woodcock*, 154 Mass. 535, 28 N. E. 907.

⁴⁵ See *ante*, §§ 628, 687.

⁴⁶ *Kirby v. Moody*, 84 Tex. 201, 19 S. W. 453.

⁴⁷ *Bailey v. Fanning Orphan School*, 12 Ky. L. Rep. 644, 14 S. W. 908; *Sproule, as trustee, etc v. Davies*, 171 N. Y. 277, 63 N. E. 1106; *Goerz v. Barstow*, 148 Fed. 562, 78 C. C. A. 248. See *Elder v.*

Hamilton, 195 Pa. St. 559, 46 Atl. 109; *Kiernan v. Jersey City*, 80 N. J. L. (51 Vroom) 273, 78 Atl. 228; *McDonald v. Hoffman*, 153 N. C. 254, 69 S. E. 49; *Lander v. Meserole*, 133 N. Y. Supp. 340; *Karcher v. Gans*, 13 S. D. 383, 79 Am. St. Rep. 893, 83 N. W. 431; *Gooding v. Ransom*, 63 Neb. 78, 88 N. W. 169.

foreclosure sale.⁴⁸ Failure to determine all the issues involved in the foreclosure action will not invalidate the sale thereunder.⁴⁹

It has been said that although a sale of mortgaged premises under a power of sale contained therein, in the absence of the mortgagee, is irregular, the legal title passes to the purchaser by the deed given to him.⁵⁰ And in those cases where the mortgage is invalid because of the failure of the mortgagee, a foreign corporation, to comply with the State laws in respect to having a place of business in the State, with an authorized agent, this will not invalidate the title under a sale made under the power contained in the mortgage, for the reason that the contract evidenced by the mortgage is fully executed.⁵¹

The supreme court of Minnesota, in the case of *Russell v. H. C. Akeley Lumber Company*,⁵² say that a purchaser at a defective foreclosure sale, or his assigns, who goes into possession of the premises with the assent of the mortgagor, or his successors, will be deemed a mortgagee in possession, and if he remains in possession until the right of redemption is barred, he becomes vested with the title.

§ 693. Same—Junior liens.—In those cases where the proceedings are regular, and junior lienors are duly made parties to the action, the purchaser takes the realty freed from the lien of the junior incumbrancers,⁵³ subject to the

⁴⁸ See *Clapp v. McCabe*, 155 N. Y. 525, 50 N. E. 274.

⁴⁹ *Brown v. Johnson*, 58 Neb. 222, 78 N. W. 515.

⁵⁰ *Lanier v. McIntosh*, 117 Mo. 508, 38 Am. St. Rep. 676, 23 S. W. 787.

⁵¹ *Gamble v. Caldwell*, 98 Ala. 577, 12 So. 424.

⁵² 45 Minn. 376, 48 N. W. 3.

⁵³ *Duesterberg v. Swartzel*, 115

Ind. 180, 17 N. E. 155; *Huzzey v. Heffernan*, 143 Mass. 232, 9 N. E. 570; *Heinss v. Henry*, 127 La. 770, 54 So. 24. See *Hitchler v. Citizens' Bank*, 63 Miss. 403; *Stewart v. Wheeling & L. E. R. Co.* 53 Ohio St. 151, 41 N. E. 247, 34 Ohio L. J. 56, 2 Ohio Leg. News, 659, 29 L.R.A. 438; *Englehart-Hitchcock Co. v. Central Investment Co.* 136 Ga. 564, 71 S. E. 787. See also

right to redeem,⁵⁴ and in some states even that privilege is denied.⁵⁵ And after a valid sale under a senior mortgage a junior mortgagee cannot, by a suit to foreclose on the same property, compel one who claims to hold the title passed by such sale to appear and make proof thereof.⁵⁶

But in all jurisdictions where a senior mortgagee forecloses his mortgage and sells the property without making the junior mortgagee a party, or giving him notice, the purchaser at such judicial sale, whether it be the senior mortgagee or a stranger, acquires his title subject to the right of redemption by the junior mortgagee.⁵⁷ And the same rule obtains where the junior mortgagee has assigned all his interest in the mortgage and the notes secured thereby to a third person, who is not a party, and is without notice of such proceedings and sale;⁵⁸ and such owner of the notes and junior mortgage may maintain an action against such purchaser to foreclose his mortgage,⁵⁹ because the record of the junior unsatisfied mort-

Thompson v. Hemenway, 218 Ill. 46, 109 Am. St. Rep. 239, 75 N. E. 791.

A purchaser on foreclosure takes the property discharged from all liens and interests acquired pending the suit by persons charged with constructive notice thereof, although they were not made parties to the suit; and the latter must seek satisfaction from the proceeds of the sale. This was the case of a sale of a railway. *Stewart v. Wheeling & L. E. R. Co.* 53 Ohio St. 151, 34 Ohio L. J. 56, 2 Ohio Leg. News, 659, 41 N. E. 247, 29 L.R.A. 438.

⁵⁴ *Duesterberg v. Swartzel*, 115 Ind. 180, 17 N. E. 155.

⁵⁵ The supreme judicial court of Massachusetts, in the case of *Huzzey v. Heffernan*, 143 Mass. 232, 9 N. E. 570; say that a sale under foreclosure of a prior mortgage

terminates the interest of the junior mortgagee in the premises, and vests in the purchaser an estate in fee free from the junior mortgage, or from any right of redemption in the mortgagor or his subsequent grantees.

⁵⁶ *Hitchler v. Citizens' Bank*, 63 Miss. 403.

⁵⁷ *Holliger v. Bates*, 43 Ohio St. 437, 2 N. E. 841. See *Levin v. Gates, as trustee, etc.* 71 Misc. 234, 128 N. Y. Supp. 746. See also *Capehart v. McGahey*, 132 Ala. 334, 31 So. 503.

⁵⁸ *Holliger v. Bates*, 43 Ohio St. 437, 2 N. E. 841.

⁵⁹ *Holliger v. Bates*, 43 Ohio St. 437, 2 N. E. 841.

The fact that the purchaser of the notes and mortgage did not take a written assignment of the junior mortgage and record it, or obtain from the mortgagor a quit

gage to secure notes unpaid at the time of such sale put the purchaser upon inquiry.⁶⁰

§ 694. **Same—Licenses and trusts.**—It is held that the purchaser at a mortgage sale of lands subject to a secret resulting trust takes the land freed from the trust, where the mortgagee had no notice of the trust at the time of taking the mortgage, although such purchaser had notice at the sale, and was a surety on the bond secured by the mortgage, and was familiar with the whole transaction.⁶¹ And a person who takes possession of premises under a mere license from the mortgagee cannot set up his possession against the claim of a purchaser at a regular foreclosure sale under the mortgage to immediate possession, sustained by the referee's deed, although such licensee has had no notice of the foreclosure proceedings.⁶²

The supreme judicial court of Massachusetts, in the case of *Cook v. Young*,⁶³ say that an arrangement between persons interested in real estate subject to a mortgage, that at foreclosure one should take title, and, after making sale, divide the surplus, implies that such one should have power, in his discretion, to make a sale, convey good title to the purchaser, and collect the purchase money, and does not create a resulting trust following the land. And it is also said the fact that the first mortgagee is, by the terms of the mortgage, to receive all profits and gains from the mortgaged property, and after paying what is due to himself, to pay over any surplus to the other creditors, does not make him a trustee for them, where no surplus ever comes into his hands, so as to

claim deed of his equity of redemption and record it, does not defeat his junior mortgage, or estop him from foreclosing it. *Holliger v. Bates*, 43 Ohio St. 437, 2 N. E. 841.

⁶⁰ *Holliger v. Bates*, 43 Ohio St. 437, 2 N. E. 841.

⁶¹ *Logan v. Eva*, 144 Pa. St. 312, 22 Atl. 757, 28 W. N. C. 464, 48 Phila. Leg. Int. 454.

⁶² *Wing v. De la Rionda*, 131 N. Y. 422, 30 N. E. 243, 43 N. Y. S. R. 305.

⁶³ 11 N. E. 752.

affect his purchase of the property on a foreclosure for his debt.⁶⁴

§ 695. Same—"More or less."—In the conveyance and mortgaging of real estate it is the usual practice to describe the property by metes and bounds, or governmental subdivisions, and fractions thereof, specifying the number of acres, and adding the qualification, "more or less."⁶⁵ But it is said that the omission of the words "more or less" after the number of acres is given in a mortgage, from the execution founded on a judgment of foreclosure, and from the entry of a levy, will not vitiate the sale as a sale of the entire tract embraced in the mortgage, or limit the quantity sold to the exact number of acres stated.⁶⁶ And the supreme court of South Carolina, in *ex parte Boyce*,⁶⁷ say that the purchaser of property at a mortgage foreclosure is entitled to a tract of three and one quarter acres on which the residence is situated, as well as to a tract of sixty-five and one-half acres, where it is described in the mortgage, and also in the complaint in the foreclosure proceedings as "being a place whereon" the mortgagor resides and containing sixty-five and one-half acres, more or less, and the mortgagor for many years has treated the two parcels as one tract.

§ 696. Same—Mortgaged succession.—The supreme court of Louisiana, in the case of Forstall's Succession,⁶⁸ say that where mortgaged succession property is sold by executory process, the purchaser cannot be compelled to pay to the succession representative the amount of ranking special mortgages which he is entitled to retain after satisfying the junior

⁶⁴ *New Orleans Nat. Banking Asso. v. Le Breton*, 120 U. S. 765; 30 L. ed. 821, 7 Sup. Ct. Rep. 772.

⁶⁵ See 3 Kerr on Real Prop. §§ 2335, 2336.

⁶⁶ *Breach v. O'Neal*, 94 Ga. 474, 20 S. E. 133. See *Skaggs v. Kelly*, 42 S. W. 275. (Tenn.)

⁶⁷ 19 S. E. 495.

⁶⁸ 39 La. An. 1052, 3 So. 277.

mortgage of the seizing creditor, but it is otherwise if the unsatisfied mortgages are general.⁶⁹

§ 697. Same—Obligations of purchasers.—In those cases where the grantee of a mortgagor takes subject to two mortgages, and purchases the property at a foreclosure sale under the first mortgage, this will not extinguish the lien of the second mortgagee, because, having taken his conveyance from the mortgagor subject to the lien of the second mortgage, he is bound thereby.⁷⁰ And a bondholder purchasing at a mortgage foreclosure sale and paying bonds for the mortgaged property may be compelled, by personal judgment, to pay the amount due upon other bonds subsequently decreed to be of equal standing with the bonds of such purchaser.⁷¹

The supreme court of the United States, in *Olcott v. Headrick*,⁷² say that a purchaser of property at a foreclosure sale under a decree which makes him liable for claims against the receiver which shall be presented within six months after the confirmation of the sale, is liable for such a claim presented after said six months, where the decree of confirmation of the sale makes such purchaser liable for all claims against the receiver without any limitation as to the time of their presentation. And the same court say in the early case of *Lovell v. Cragin*,⁷³ that the obligation of purchasers on foreclosure to pay their *pro rata* share of the debt to holders of notes who are not parties, follows the land in the hands of third persons not parties to the judgment, and is in the nature of a judicial mortgage; but to be effective in Louisiana, as to such third persons, the judgment must be inscribed with the recorder of mortgages, and does not give a lien until it has been registered as required by the statutes.

⁶⁹ *Forstall's Succession*, 39 La. An. 1052, 3 So. 277.

⁷⁰ See *Kennedy v. Borie*, 166 Pa. St. 360, 31 Atl. 98, 36 W. N. C. 73.

⁷¹ *Moran v. Hagerman*, 12 C. C. A. 239, 64 Fed. 499.

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⁷² 141 U. S. 543, 35 L. ed. 851, 12 Sup. Ct. Rep. 81.

⁷³ 136 U. S. 130, 34 L. ed. 372, 10 Sup. Ct. Rep. 1024.

§ 698. **Same—Parol trusts.**—It is thought that where mortgaged lands are held under a parol trust, of which the mortgagee has no knowledge, and forecloses his mortgage without joining the beneficiaries, this will not avoid the sale, even though the purchaser had knowledge of the terms.⁷⁴

§ 699. **Same—Possession and ejectment.**—We have already seen that the purchaser at a foreclosure sale,—be he the mortgagee, lien holder, or a stranger,—acquires all the rights and estate of the mortgagor.⁷⁵ Among other things he is entitled to recover in ejectment as against the mortgagor,⁷⁶ and also against persons, not made parties, for the purpose of determining the rights of the latter.⁷⁷ It is thought that a notice to quit, or demand for possession, need not be given by a purchaser at foreclosure sale in those cases where the occupant denies the tenancy and asserts ownership in himself.⁷⁸

§ 700. **Same—Prior liens—Rights and liabilities.**—It is axiomatic, though formally adjudicated and determined, that a mortgage foreclosure does not cut off the rights of persons and parties under a prior mortgage, where those rights are reserved by the decree.⁷⁹ It is equally true that a purchaser at

⁷⁴ *Cooper v. Loughlin*, 75 Tex. 524, 13 S. W. 37.

⁷⁵ See *ante*, § 683.

⁷⁶ *Gill v. Weston*, 110 Pa. St. 305, 1 Atl. 917.

The supreme court of Pennsylvania, in the case of *Gill v. Weston*, *supra*, say it is unnecessary that such purchaser, in an action of ejectment brought by him against the defendant in the execution on which the land was sold, or any one coming into possession under him, should show previous title to the land in the defendant in the execution. It is sufficient for him to

show the judgment and execution with proceedings thereon. See *Young v. Algeo*, 3 Watts (Pa.) 223, 227.

⁷⁷ *Dodge v. Omaha & S. W. R. Co.* 20 Neb. 276, 29 N. W. 936.

⁷⁸ *Sims v. Cooper*, 106 Ind. 87, 5 N. E. 726.

⁷⁹ *Humphreys v. McKissock*, 140 U. S. 304, 35 L. ed. 473, 11 Sup. Ct. Rep. 779; 46 Am. & Eng. R. Cas. 261, 10 Ry. & Corp. L. J. 303.

A purchaser of a railroad sold under a decree of foreclosure, discharged of all liens and claims against the former owner or its re-

a sale under a prior mortgage to the foreclosure of which the subsequent mortgagees were not made parties, cannot maintain an action to compel them to pay the amount of the prior mortgage and of the improvements placed by him on the premises.⁸⁰ And when a purchaser takes land expressly subject to two mortgages he cannot, by defaulting in the payment of interest upon the prior mortgage, bring about a sheriff's sale and buy in the land so as to hold it discharged from the lien of the second mortgage; especially is this true where he enters into a combination for such result, and conceals the pendency of the foreclosure of the prior mortgage.⁸¹ A sale under the foreclosure of a junior mortgage is subject to the senior lien and the purchaser at such sale buys only the equity of redemption.⁸² On the same principle, it is held that a purchaser at a foreclosure sale does not acquire a title paramount to a mortgage upon a portion of the premises as to which the lien of the mortgage foreclosed has been released, by taking in his own name a tax title under delinquent taxes paid with moneys paid to him by the referee out of the proceeds of the sale, under a provision of the decree that the back taxes be paid first, nor by the payment of taxes subsequently assessed against the property, since the back taxes are in effect paid by the court out of the moneys of those who should have paid them in the first instance, and the subsequent taxes are properly payable by such purchaser.⁸³

The title of the purchaser at a foreclosure sale relates back to the time of the execution of the mortgage.⁸⁴ Hence, it has been held that the purchaser at foreclosure sale of a building one wall of which the mortgagor, after the execution of the mortgage, had agreed in writing that the adjoin-

ceivers, cannot be compelled to pay a judgment against the receivers in favor of an injured employee. *Chicago & O. R. R. Co. v. McCammon*, 61 Fed. 772.

⁸⁰ *Robbins v. Beers*, 49 N. Y. S. R. 360, 21 N. Y. Supp. 221.

⁸¹ *Kennedy v. Borie*, 166 Pa. St. 360, 31 Atl. 98, 36 W. N. C. 73.

⁸² *Garza v. Howell*, 37 Tex. Civ. App. 585, 85 S. W. 461.

⁸³ *Morss v. Burns*, 17 N. Y. Supp. 739, 44 N. Y. S. R. 479.

⁸⁴ See *post*, § 712.

ing owner could use as a party-wall and place his joists therein, acquires such party wall and the ends of the joists placed therein, where the adjoining owner is duly made a party to the foreclosure action and barred of all right to the mortgaged property.⁸⁵ The Delaware chancery court, in the case of *Foxwell v. Slaughter*,⁸⁶ say that the purchaser of lands at a judicial sale on *scire facias* upon a mortgage cannot restrain the prosecution to judgment, by an assignee of a purchase money mortgage upon the same land, duly recorded and open to his inspection and executed at the same time as the mortgage on which the sale was had, although recorded later, on the grounds that it was agreed between the parties to both mortgages at the time of their execution, but not expressed therein, that the lien of the purchase-money mortgage was to be postponed to that of the other mortgage, and that the declarations of third parties and the general understanding were to the effect that the sale at which he purchased would pass a fee title.

It is a general rule that a mortgagor cannot claim any benefit from a purchase of outstanding titles or claims to the property by the purchaser at the sale under the mortgage.⁸⁷ And the supreme court of Iowa, in the case of *Austin v. Bowman*,⁸⁸ say that it is not evidence of bad faith on the part of one holding a certificate to lands sold on foreclosure of a superior lien, that afterwards, observing defects in a title, he took security to protect himself against other incumbrances; nor will equity require him to abandon his valid title to the land and seek to recover on his security.

§ 701. Same—Purchaser at irregular or invalid sale.—Invalid sales of mortgaged property convey no title as against parties having an interest or an equity in the mortgaged premises; an irregularity in such sale may be such as to prevent

⁸⁵ *Leavenworth Lodge, No. 2, I. O. O. F. v. Byers*, 54 Kan. 323, 38 Pac. 261.

⁸⁶ 5 Del. Ch. 396.

⁸⁷ *Ritchie v. Judd*, 137 Ill. 453, 27 N. E. 682.

⁸⁸ 81 Iowa, 277, 46 N. W. 1111.

the title from passing thereunder. Thus it has been said that a purchaser of property at a sale under a deed of trust, with knowledge of an order enjoining the sale, acquires only such right, as against the plaintiff in the action wherein the injunction issued, as the equity of the trust creditor may, on hearing the cause, be held to confer.⁸⁹ And the mortgagee purchasing at an irregular foreclosure sale and conveying the land to a *bona fide* purchaser, may be compelled to account to the holder of an unrecorded deed who was not made a party.⁹⁰ Where there is nothing due upon the mortgage when it is foreclosed no legal title is obtained by the purchaser.⁹¹

The supreme court of Minnesota, in the case of *Jellison v. Halloran*,⁹² say that a grantee of a purchaser at a void foreclosure sale, who goes into and holds possession in good faith and under circumstances from which assent of the mortgagor may be implied, is the equitable assignee of the mortgage, and occupies the position of a mortgagee in possession.⁹³ And a purchaser of land at a sale under a trust deed made without the owner's knowledge and without any purpose to pay off the debt secured, but merely to give title to the purchaser in order that he may hold it as security for a debt from the owner's husband, can hold it, if at all, as a lien for no more than the amount bid in his name at the trustee's sale.⁹⁴ The mortgagor cannot avoid the effects of a void foreclosure, without offering to pay what is equitably due under the decree with interest.⁹⁵

⁸⁹ *Osborn v. Glascock*, 39 W. Va. 749, 20 S. E. 702.

⁹⁰ *Slattery v. Schwannecke*, 44 Hun (N. Y.) 75.

⁹¹ *Bowen v. Brogan*, 119 Mich. 218, 75 Am. St. Rep. 387, 77 N. W. 942.

⁹² 44 Minn. 199, 46 N. W. 332.

⁹³ It is thought that the heirs of a mortgagor of two lots, each of which is liable for the entire debt,

should not be permitted to recover one of the lots from a purchaser at a void sale under the mortgage, without fully reimbursing the purchaser for money used in discharging the debt. *Whitney v. Krapp*, 8 Tex. Civ. App. 304, 27 S. W. 843.

⁹⁴ *Rogers v. Rogers*, 141 Ill. 226, 30 N. E. 542, aff'g 40 Ill. App. 480.

⁹⁵ *Stull v. Masionka*, 74 Neb. 309, 104 N. W. 188, 108 N. W. 166.

§ 702. Same—Rents—Title to.—The rents, issues and profits of mortgaged property pass to the purchaser thereof at a foreclosure sale. But a purchaser on foreclosure sale is not entitled to recover from the mortgagor for rent thereafter collected by him, where he did not assume to act as the purchaser's agent in the transaction. The remedy of the purchaser in such case is against the tenant.⁹⁶ Hence in those cases where a lessee who anticipates the payment of rent, with notice of an existing mortgage upon the premises, does so at his own peril, and can be compelled to pay a second time by the purchaser at a foreclosure sale under the mortgage, for the period elapsing after the foreclosure.⁹⁷

§ 703. Same — Riparian mortgages. — The supreme court of New York, in the case of the Mutual Life Insurance

⁹⁶ *Hatch v. Sykes*, 64 Miss. 307, 1 So. 248.

⁹⁷ *Hartley v. Meyer*, 2 Misc. 56, 20 N. Y. Supp. 855, 49 N. Y. S. R. 351.

The Indiana supreme court, in the case of *Bryson v. McCrary*, 102 Ind. 1, 1 N. E. 55, say that under the act of 1879, the tenant of the judgment debtor in possession was treated as the tenant of the purchaser, and was accountable to him for the reasonable rents, in the first instance, whether the judgment debtor was solvent or insolvent. If the premises were not redeemed, the rents so collected belonged to the purchaser. If the premises were redeemed, the rents so collected were allowed as a payment in favor of the judgment debtor on the judgment. Under Act 1861, if a person in good faith bought the rents from the judgment debtor, he could hold them as against the execution purchaser, and was not liable to him therefor. Under Act

1879, if a person bought the rents from the judgment debtor, he paid for them at his peril, because the occupant of the premises was liable to the execution purchaser for the reasonable rents. But these changes did not so materially affect the rights of the mortgagor under a contract made before Act 1879 took effect as to bring that Act within the constitutional limitation as to existing contracts. The case of *Gale v. Parks*, 58 Ind. 117, so far as it holds that the execution purchaser might recover rents of the judgment debtor independently of the statute, must be regarded as overruled. *Bryson v. McCrary*, 102 Ind. 1, 1 N. E. 55.

In railroad mortgages and foreclosures a receiver of a road does not, by his receipt of rent from a lessee of the right to use a portion of the road under a contract made pending the suit, and by his recognition of the contract, create a general tenancy so as to affect the

Company v. Voorhis,⁹⁸ say that a mortgagee of upland does not, upon foreclosure of his mortgage, obtain a title to lands under water in front of the upland, granted to the mortgagor by the state after the execution of the mortgage, and not included in the description in the mortgage.⁹⁹

rights of the purchasers on foreclosure. *Farmers' Loan & T. Co. v. Chicago & A. R. Co.* 44 Fed. 653.

⁹⁸ 71 Hun (N. Y.) 117, 24 N. Y. Supp. 529, 53 N. Y. S. R. 874.

⁹⁹ This holding seems to be somewhat in conflict with the New Jersey doctrine as heretofore given (See *ante*, § 291), and for that reason the facts in the case are here set out fully and the reasoning of the court given *in extenso*. The facts in the case are as follows: "Peter Voorhis owned a lot of land in Nyack, Rockland county, bounded on the east by the Hudson river. On the 25th of April, 1872, he executed a mortgage, in which his wife joined, to the plaintiff, to secure a loan of \$40,000. This mortgage was foreclosed, and on the 23rd of July, 1873, was sold under a decree in the foreclosure action. The plaintiff bought in the property for \$10,000, and duly entered a judgment for the deficiency, which was \$32,853.40, on the 9th of December, 1880. On the 30th day of November, 1872, Peter Voorhis applied to the commissioners of the land office for a grant of land under water adjacent to this mortgaged property, and also in front of two other pieces he owned, adjoining the same. The grant was made upon the petition of Voorhis that he was the owner of the upland, and in occupation of the same, and that the grant was needed for the beneficial

enjoyment of the adjoining uplands for shipping stone quarried on the uplands, and that the petitioner intended to build a dock for public steamboat uses and general purposes. Upon due publication of the notice of application the people of the state of New York granted the lands under water "for the purpose of promoting the commerce of our said state, or for the beneficial enjoyment of the adjacent owner," on the 23rd of July, 1873. Peter Voorhis died in the next year. The defendants were the heirs at law of the deceased. The court in the course of the opinion say: "The question is, what interest the facts gave the plaintiff in the lands under water in front of the mortgaged upland. A grant to any other person than the upland owner is void. (New York Session Laws, 1850, c. 283.) The applicant, Voorhis, was the owner of the land up to the sale under foreclosure. Before that time the mortgage was simply a security. Plaintiff had no other interest in the land than to be paid out of it. *Waring v. Smyth*, 2 Barb. Ch. (N. Y.) 119, 47 Am. Dec. 299; *Calkins v. Calkins*, 3 Barb. Ch. (N. Y.) 305; *Gardner v. Heartt*, 3 Den. (N. Y.) 232; *Aster v. Miller*, 2 Paige. Ch. (N. Y.) 608; *Morris v. Mowatt*, 2 Paige. Ch. (N. Y.) 586, 22 Am. Dec. 661; *Astor v. Hoyt*, 5 Wend. (N. Y.) 603. The description in the mortgage did not

§ 704. Same—Subrogation of purchaser.—The general rule is that a *bona fide* purchaser at a mortgagee's sale which proves defective is, after paying the purchase money, subrogated to the rights of the mortgagee.¹ The mortgage is in

include the lands under water. When it was given, Voorhis, the mortgagor, had no interest in it. The land belonged to the state. *People v. Canal Appraisers*, 33 N. Y. 461; *Ledyard v. Ten Eyck*, 36 Barb. (N. Y.) 102. The court of appeals, in *Gould v. Railroad Company* (6 N. Y. 522), held that the owner of the upland had no other right than all others in the lands under water, and, while this principle is questioned in *Rumsey v. Railroad Company* (133 N. Y. 79, 15 L.R.A. 618, 28 Am. St. Rep. 600, 30 N. E. 654), no question is made as to the title being in the people as to lands between high water mark and under water. *Blakslee Manufacturing Co. v. Blakslee Sons Iron Works*, 129 N. Y. 155, 29 N. E. 2; *Rumsey v. Railroad Co.* 114 N. Y. 423, 21 N. E. 1066; *People v. New York & S. I. Ferry Co.* 68 N. Y. 71. The foreclosure sale did not, therefore, extend a title in lands not covered by it. The mortgaged lands were not extended by the mortgage being on tide water, as the lands under water then belonged to the sovereign. The title Voorhis took was absolute and unconditional. *Abbott v. Curran*, 98 N. Y. 665. The patentee, being the owner of the upland thereof, got a good title, and, if any right was obtained by the foreclosure sale, it was a right to sue for damages for an injury to the right of the upland to go to the river. This right was destroyed by

the upland owner himself, and the mortgagee got the land covered by the mortgage."

See also *Leonard v. Wood*, 33 Ind. App. 83, 70 N. E. 827.

¹ *Bruschke v. Wright*, 166 Ill. 183, 57 Am. St. Rep. 125, 46 N. E. 813; *Equitable Mortgage Co. v. Gray*, 68 Kan. 100, 74 Pac. 614; *Finlayson v. Peterson*, 11 N. D. 45, 89 N. W. 855; *Griffin v. Griffin*, 75 S. C. 249, 117 Am. St. Rep. 899, 55 S. E. 317. See *Jordan v. Sayer*, 29 Fla. 100, 10 So. 823; *Brown v. Brown*, 73 Iowa 430, 35 N. W. 507; *Lanier v. McIntosh*, 117 Mo. 508, 38 Am. St. Rep. 676, 23 S. W. 787; *Townsend v. Thomson*, 139 N. Y. 152, 34 N. E. 891, 54 N. Y. S. R. 665; *Brewer v. Nash*, 16 R. I. 458, 27 Am. St. Rep. 749, 17 Atl. 857; *Givins v. Carroll*, 40 S. C. 413, 42 Am. St. Rep. 889, 18 S. E. 1030; *McCamant v. Roberts*, 87 Tex. 241, 27 S. W. 86, rev'g, 25 S. W. 731; *Capell v. Dill*, 82 Kan. 652, 109 Pac. 286; *Rodman v. Quick*, 211 Ill. 546, 71 N. E. 1087; *Kelso v. Norton*, 65 Kan. 778, 93 Am. St. Rep. 308, 70 Pac. 896; *Stouffer v. Harlan*, 68 Kan. 135, 64 L.R.A. 320, 104 Am. St. Rep. 396, 74 Pac. 610; *Sloane v. Lucas*, 37 Wash. 348, 79 Pac. 949; *Investment Securities Co. v. Adams*, 37 Wash. 211, 79 Pac. 625; *Boscher v. Van Beek*, 19 N. D. 104, 122 N. W. 338; *Stough v. Badger Lumber Co.* 70 Kan. 713, 79 Pac. 737. See also *Sims v. Steadman*, 62 S. C. 300, 40 S. E. 677.

A purchaser of mortgaged prem-

equity regarded as assigned to such purchaser,² even if the mortgagee's deed to him does not contain language amounting to a legal assignment. And this is so, even in case of a minor whose guardian inserted in the mortgage invalid powers of

ises who pays the purchase price at a foreclosure sale which is invalid because of failure to describe the land in the advertisement or the deed, is entitled in equity to the security of the mortgage for the amount due and paid on the debt. *Lanier v. McIntosh*, 117 Mo. 508, 38 Am. St. Rep. 676, 23 S. W. 787.

There being irregularities a purchaser at a sale of lands subsequently declared void therefor, made under a power in a mortgage, as well as purchasers thereof at a subsequent partition sale among the purchasers' heirs, is subrogated to the rights of the mortgagee, and such purchase operates as a transfer of the mortgage to him. *Givins v. Carroll*, 40 S. C. 413, 42 Am. St. Rep. 889, 18 S. E. 1030.

The owner of the equity of redemption not being a party to a sale under a decree in a foreclosure suit no title is conveyed, but the purchaser becomes subrogated to the rights of the mortgagee in the premises, as well as in the mortgage debt. *Jordan v. Sayre*, 29 Fla. 100, 10 So. 823. See *ante*, § 137.

The court of appeals of New York, in the case of *Townsend v. Thomson*, 139 N. Y. 152, 34 N. E. 891, 54 N. Y. S. R. 665, say that a purchaser at a mortgage foreclosure sale defective and void as against the owner of the equity of redemption because he was not made a party to the action becomes an assignee of the mortgage, and, if he

lawfully enters into possession of the land, a mortgagee in possession.

Where three judgments in foreclosure were attempted to be satisfied by one sale, which was held erroneous because one of them was against a single individual and the others were jointly against him and another, and the sale was set aside, a purchaser who has paid the two joint judgments may be subrogated to the rights of the mortgage creditors under those judgments. *Brown v. Brown*, 73 Iowa, 430, 35 N. W. 507.

In *Texas* a probate court has no jurisdiction, without the mortgagor being made a party to order a sale by an administrator of a duplicate land certificate which was mortgaged to the intestate for a loan of money and for his services in procuring and locating it upon the lands; and such sale will vest in the purchaser no title to the certificate or land nor any right to the mortgage, and will not subrogate him to any of the mortgagee's rights, or to the lien upon the land or the certificate. *McCamant v. Roberts*, 87 Tex. 241, 27 S. W. 86, rev'g 25 S. W. 731.

² See *Titcomb v. Fonda, Johnstown & Gloversville R. R. Co.* 38 Misc. 630, 78 N. Y. Supp. 226; *Smithson Land Co. v. Brautigam*, 16 Wash. 174, 47 Pac. 434. See also *Nash v. Northwest Land Co.* 15 N. D. 566, 108 N. W. 792.

sale.³ And it is said that an entry of satisfaction on the record of a mortgage by the mortgagee after an invalid sale of the premises does not debar the purchaser, who has paid the purchase price, of his right to the security of the mortgage for the amount due and paid on the debt.⁴

It is thought that as between heirs of a mortgagor and persons claiming under a purchaser at a void sale under a power contained in the mortgage, such persons are entitled to be credited with the amount paid at such mortgage sale, with interest added thereto annually, from which is to be deducted the rent due from them, but to which is to be added the amount paid for improvements and taxes.⁵

§ 705. Same—Taxes on land—Liability of purchaser for.—It has been said that the purchaser of real estate at a sale under a mortgage or trust deed is liable for the taxes accruing during the year of the sale,⁶ but which have not been assessed at the time, especially where the auctioneer publicly announced at the sale that the purchaser would be required to pay all the taxes for that year.⁷ The supreme court of North Carolina say that a purchaser at a foreclosure sale obtains the premises free and clear from the burden of taxes resting upon them at the time the mortgage was executed, where the mortgagee at the time of the execution had no notice of such taxes, although the purchaser had notice thereof before his purchase under the statute,⁸ providing that arrears of taxes “shall not affect purchasers without notice.”⁹ But

³ *Brewer v. Nash*, 16 R. I. 458, 27 Am. St. Rep. 749, 17 Atl. 857.

⁴ *Lanier v. McIntosh*, 117 Mo. 508, 38 Am. St. Rep. 676, 23 S. W. 787.

⁵ *Givins v. Carroll*, 40 S. C. 413, 42 Am. St. Rep. 889, 18 S. E. 1030.

⁶ See *Fidelity Insurance Trust & Safe Deposit Co. v. Roanoke Iron Co.* 84 Fed. 744; *Carroll v. Haigh*, 97 Ill. App. 576. Contra, see

Equitable Life Assurance Society of United States v. Toplitz, 69 Misc. 457, 128 N. Y. Supp. 153.

⁷ *Grosvenor v. Bethel*, 93 Tenn. 577, 26 S. W. 1096. See *Union Trust Co. v. Electric Park Amusement Co.* 135 N. W. 115 (Mich.)

⁸ N. C. Laws, 1891, c. 391.

⁹ *Moore v. Sugg*, 114 N. C. 292, 19 S. E. 147.

the supreme court of South Carolina, in the case of *Wilson v. Cantrell*,¹⁰ say that a purchaser under foreclosure of a mortgage, having a lien before the issuance of a tax execution, takes title subject to that of the purchaser under the tax execution by virtue of the South Carolina statute declaring all taxes, assessments and penalties a first lien in all cases whatever upon the property taxed.¹¹

The supreme court of Missouri, in the case of *Bensieck v. Cook*,¹² say that the payment of taxes and of part of the debt secured by a trust deed is not a defense or counterclaim in favor of the owner of the equity of redemption against the purchaser of the property at the trustee's sale.¹³

§ 706. Same—Timber—Right to.—The purchaser at mortgage sale acquires the trees growing upon the property at the time of the sale; and the title relating back to the time of the execution of the mortgage.¹⁴ it therefore follows that a purchaser at a foreclosure sale takes free from the right conveyed by the mortgagor, subsequent to the execution of the mortgage, to cut timber on the land, although the grantee of such right purchased the mortgage and assigned it, with a verbal agreement that the timber should be discharged from the lien of the mortgage, where such purchaser had no notice of such agreement.¹⁵ And the purchaser of land at a sale under a power in a mortgage gets a good title to the timber

¹⁰ 40 S. C. 114, 18 S. E. 517.

¹¹ *Wilson v. Cantrell*, 40 S. C. 114, 18 S. E. 517.

¹² 110 Mo. 173, 33 Am. St. Rep. 422, 19 S. W. 642.

¹³ *Bensieck v. Cook*, 110 Mo. 173, 33 Am. St. Rep. 422, 19 S. W. 642.

In re Byrnes (N. Y. 1886) the purchaser of real estate on foreclosure of a mortgage, made application to be allowed on his purchase money the amount of taxes on the property for the years 1877–

1885, remaining unpaid, which was opposed on the ground that said taxes were illegally assessed and therefore not valid liens, and on consideration by the court was refused, with liberty to the purchaser to be relieved from his purchase.

¹⁴ See *ante*, § 700; *post*, § 712.

¹⁵ *Beaufort County Lumber Co. v. Dail*, 111 N. C. 120, 15 S. E. 941, rehearing denied in 112 N. C. 350, 17 S. E. 537.

thereon as against a purchaser of the timber from the mortgagor, although he has had notice of an unrecorded release by the mortgagee as to the timber right after the sale, but before taking the deed.¹⁶

§ 707. Same—Usury—Bona fide purchaser.—It is a well settled rule that the title of an innocent purchaser of land at a judicial sale under a mortgage is not affected by the usurious character of the mortgage.¹⁷ It follows therefore that a person who, after the foreclosure sale and before the expiration of the time of redemption, purchases the interest or estate of the mortgagee who bid in the property, will be protected as a *bona fide* purchaser.¹⁸

§ 708. Execution and delivery of deed.—The referee or sheriff making a sale of mortgaged premises under a decree of foreclosure, is required to execute a deed of the premises to the purchaser on such sale.¹⁹ The deed may be executed and delivered before the sale is confirmed;²⁰ it will take effect immediately upon delivery, and divests all parties to the action of the title from the time of the sale.²¹

The court will not order the officer making a sale to execute and deliver a deed to the purchaser until the whole of

¹⁶ *Barber v. Wadsworth*, 115 N. C. 29, 20 S. E. 178.

¹⁷ *Sharpe v. Tatnall*, 5 Del. Ch. 302; *Holmes v. State Bank*, 55 Minn. 530, 55 N. W. 555.

¹⁸ *Holmes v. State Bank of Duluth*, 53 Minn. 530, 55 N. W. 555.

¹⁹ N. Y. Supreme Court Rule 61.

²⁰ See *Mitchell v. Bartlett*, 51 N. Y. 447, aff'g 52 Barb. (N. Y.) 319; *Fort v. Burch*, 6 Barb. (N. Y.) 60; *Fuller v. Van Geesen*, 4 Hill (N. Y.) 171; *Jones v. Burden*, 20 Ala. 382; *Walker v. Schum*, 42 Ill. 462; *Jackson v. Warren*, 32 Ill. 331.

²¹ *McLaren v. Hartford Ins. Co.* 5 N. Y. 151; *Fort v. Burch*, 6 Barb. (N. Y.) 60; *Fuller v. Van Geesen*, 4 Hill (N. Y.) 171.

But where a purchaser of land at a sale under a decree in chancery, before confirmation of the sale, institutes a suit based upon his title acquired through such purchase, he can obtain no relief predicated on such title, even though he should, by a supplemental bill, establish a confirmation by the court subsequent to the filing of his original

the purchase money has been paid into court, even where a junior mortgagee is the purchaser and a portion of the money which is not paid in belongs to such purchaser as surplus money, and will therefore shortly have to be returned to him.²² When the deed is not ready to be delivered at the time fixed for that purpose, the remedy of the purchaser is by motion for leave to pay the money into court and to compel the referee to complete the same by delivering the deed.²³

It is said that the holder of a certificate of purchase at a foreclosure sale loses all rights under the certificate by neglecting to apply for a master's deed within the limit provided by statute;²⁴ after the time of redemption expires, he is not entitled to have the premises resold under the decree of foreclosure.²⁵ And the purchaser will not be entitled to a deed after that time even where he has been in actual possession of the land for more than fifteen years, claiming ownership, and has paid all the taxes assessed thereon.²⁶

The supreme court of Michigan, in the case of *McCammon v. Detroit, Lansing and Northern Railroad Company*,²⁷ say that the failure of the sheriff to acknowledge a deed upon foreclosure by advertisement for five days after its filing will not invalidate the sale, as depriving the owner of the right of redemption in such time by paying the register of deeds, as the filing of the deed is notice to such owner.

§ 709. Requisites of sheriff's or referee's deed.—The New York Code provides that where property is sold pursuant to a decree or a judgment, which specifies the particular party or parties, whose right, title or interest is directed to be sold, the deed must distinctly state in the granting clause thereof whose right, title or interest was sold, without naming in

bill. *Brooks v. Kelly*, 63 Miss. 616.

²² *Battershall v. Davis*, 23 How. (N. Y.) Pr. 383.

²³ *Clason v. Corley*, 5 Sandf. (N. Y.) 447.

²⁴ As Ill. Rev. Stat. c. 77, § 30.

²⁵ *Peterson v. Emmerson*, 135 Ill. 55, 25 N. E. 842; *School Trustees v. Love*, 34 Ill. App. 418.

²⁶ *Peterson v. Emmerson*, 135 Ill. 55, 25 N. E. 842.

²⁷ 103 Mich. 104, 61 N. W. 273.

that clause any of the other parties to the action; otherwise, the purchaser will not be bound to accept the conveyance, and the officer executing it will be liable for such damages as the purchaser may sustain by the omission, whether he accepts or refuses the conveyance.²⁸

This provision of the Code has been held to apply to a deed executed at a mortgage foreclosure sale, as well as to a deed executed upon the sale of property pursuant to an execution.²⁹ A referee selling under a decree of foreclosure is required to comply with said provision of the Code, by inserting in the deed of conveyance the names of the parties who executed the mortgage foreclosed, and by stating that all the right, title and interest which said mortgagors had at the time of the execution of the mortgage, was sold and thereby conveyed.³⁰

§ 710. Error in description in mortgage—Correcting in deed.—Where there is a mistake in the description of the property as given in the mortgage, it may be corrected by a proper proceeding before foreclosure, or in the action to foreclose the mortgage; but where such mistake has been carried into the decree of foreclosure, and into all the proceedings thereunder, a purchaser at the sheriff's sale cannot maintain an action to correct the decree and the subsequent proceedings although the sheriff at the sale may have pointed out, as the property which he was selling, the property that ought to have been described in the mortgage, because the authority of the sheriff to sell is limited to the property actually described in the decree and order of sale.³¹

Yet in a case where a mistake was made in the description of certain premises mortgaged, which mistake was carried through all the proceedings to foreclose the mortgage, sale

²⁸ N. Y. Code Civ. Proc. § 1244. (N. Y.) N. C. 88, 12 Hun (N. Y.)

²⁹ *Randell v. VonEllert*, 12 Hun 577.
(N. Y.) 577.

³¹ *Miller v. Kolb*, 47 Ind. 220.

³⁰ *Randell v. Von Ellert*, 4 Abb.

of the premises, confirmation of sale, and deed to the purchaser, but it appeared that the premises intended to be mortgaged had actually been appraised and sold under such mortgage, and the purchaser had taken possession of the same, the court held that no injury to the heirs of the mortgagor being shown, the grantee of the purchaser was entitled to a decree correcting the mistake and quieting his title in said premises, but at his own cost and expense.³²

The supreme court of New York say that an error in a deed and mortgage in describing the starting point cannot be remedied by proceedings to correct the misdescription, taken in a foreclosure proceeding after the sale, without notice to the purchaser; and as such misdescription renders the title unmarketable, the purchaser at the foreclosure will be relieved from his purchase.³³

A purchaser at a mortgage foreclosure sale cannot acquire the title to lands not described in the mortgage, although such lands may be described in the complaint and judgment.³⁴ And where, by mistake, real estate belonging to one person is mortgaged by another as his property, and is sold under a decree of foreclosure to a purchaser who has no notice of such mistake, it has been held that such purchaser cannot have the sale set aside and recover the purchase money bid and paid by him for such property at the sale.³⁵

³² *Parker v. Starr*, 21 Neb. 680, 33 N. W. 424.

Statements by one who was at the time the owner and in possession of land, as to where he understood the boundary line to be, are admissible as against the purchaser at the sale on foreclosure of a mortgage then on the land. *Flagg v. Mason*, 64, 6 N. E. 702.

³³ *Fitzpatrick v. Sweeney*, 56 Hun (N. Y.) 159, 30 N. Y. S. R. 525, 9 N. Y. Supp. 219, aff'd in 121 N. Y. 707 mem.

³⁴ *Hoopes v. Auburn Water Works Co.* 37 Hun (N. Y.) 568, 574.

It is thought that property omitted by accident from a trust deed, when both parties supposed the deed covered it, may be reached and sold in a foreclosure suit. *Shepard v. Pepper*, 133 U. S. 626, 33 L. ed. 706, 10 Sup. Ct. Rep. 438.

³⁵ *Neal v. Gillaspy*, 56 Ind. 451, 26 Am. Rep. 37.

And it is said that a mortgage which describes other lands of the mortgagor than those intended by the parties will not be reformed by substituting those originally intended, when the lands described therein have been sold on foreclosure and the sum realized was the full amount of the mortgage.³⁶

Where, by inadvertence, the referee's deed embraces the whole mortgaged premises, a portion of which had previously been released from the lien of the mortgage, and was excepted from the operation of the decree of foreclosure, the purchaser will acquire no title to the portion so released.³⁷ And the same would be true even if the portion of the premises so released were embraced in the decree, but were not offered at the sale.³⁸

§ 711. **Variance of description in mortgage, decree and deed.**—In a New York case it appeared that there was a clerical error in the decree of foreclosure, which consisted in giving a distance in the description of the premises as "about 193 feet, 4 inches" instead of "about 123 feet, 4 inches," which was the correct distance. The mortgage described the premises sold correctly, and they were correctly described in the *lis pendens* and in all the proceedings except the judgment. Following the words of description in the judgment was a reference to a deed, executed by the plaintiff to the defendant, in which the description was correct. The referee sold the premises described in the mortgage, and there was no pretence that the purchaser was misled. The report of sale was correct in its description, and, after the sale, an order of the court, amending the judgment by correcting the erroneous description of the premises, was entered *nunc pro tunc*, upon consent of all the parties who had appeared in the action. On motion to compel the purchaser to accept the title, it was

³⁶ *Ray v. Ferrell*, 127 Ind. 570, 27 N. E. 159.

³⁷ *Laverty v. Moore*, 32 Barb. (N. Y.) 347. See also *National Bank of*

Commerce v. Lock, 17 Wash. 528, 61 Am. St. Rep. 923, 50 Pac. 478.

³⁸ *Laverty v. Moore*, 33 N. Y. 658, aff'g 32 Barb. (N. Y.) 347.

held that the court had ample power to make such amendment.³⁹

Where a parcel of land was sold under a decree of foreclosure and conveyed to the purchaser under an erroneous impression that the mortgage covered the entire tract, the value of the entire tract having been bid and paid, and the purchaser having been placed in possession thereof, and it was afterwards discovered that, from a mistake in the description, the mortgage did not cover the entire premises intended to be mortgaged and that by reason thereof the legal title failed, it was held that the purchaser was entitled to be protected in the peaceable possession of the land purchased.⁴⁰ But it is the general rule that the title of a purchaser at a mortgage foreclosure sale is co-extensive with the description contained in the mortgage, the bill to foreclose, and the decree under which the sale is made.⁴¹

§ 712. Title of purchaser relates back to time of executing mortgage—Reserving easement.—The title of the purchaser at a sale under a decree of foreclosure relates back to the date of the delivery of the mortgage, as against all intervening purchasers and incumbrancers who were made parties to the action, or who became interested in the premises

³⁹ *Wood v. Martin*, 66 Barb. (N. Y.) 241. See *Hogan v. Hoyt*, 37 N. Y. 300; *Hotaling v. Marsh*, 14 Abb. (N. Y.) Pr. 161; *Alvord v. Beach*, 5 Abb. (N. Y.) Pr. 451; *Woodruff v. Wicker*, 2 Bosw. (N. Y.) 613; *Close v. Gillespey*, 3 Johns. (N. Y.) 518.

⁴⁰ *Waldron v. Leston*, 15 N. J. Eq. (2 McCart.) 126. See *De Rimer v. Cantillon*, 4 Johns. Ch. (N. Y.) 85.

⁴¹ *McGee v. Smith*, 16 N. J. Eq. (1 C. E. Gr.) 462. See also *Stewart v. Wilson*, 141 Ala. 405, 109 Am. St. Rep. 33, 37 So. 550.

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The Supreme Court of Iowa, in the case of *Hardin v. Iowa Railroad and Construction Company*, 78 Iowa, 726, 43 N. W. 543, 6 L.R.A. 52, 40 Am. & Eng. R. Cas. 394, say that on foreclosure of a deed of trust on land across which a railroad is constructed, a decree should not except the right of way from the sale, where the deeds for the land, and the trust created therein, make no exception thereof, and the record does not show that there is any right of way through the lands.

pendente lite.⁴² All incumbrances and liens, and all conditions, reservations and restrictions which the mortgagor may have imposed upon the property subsequently to the execution of the mortgage, will be extinguished.⁴³

Thus, a plaintiff, being the owner of a lot which was subject to a mortgage, conveyed it to M., reserving an easement therein for light and air to the windows of its church adjoining, M. assuming the mortgage. M. conveyed the lot, through a third person, to his wife, subject to the same mortgage, but without an assumption on her part to pay the amount thereof. Upon foreclosure of the mortgage, the wife of M.

⁴² *Jackson v. Ramsey*, 3 Cow. (N. Y.) 75, 15 Am. Dec. 242; *Fuller v. VanGeesen*, 4 Hill (N. Y.) 171; *Klock v. Cronkhite*, 1 Hill (N. Y.) 107; *Bissell v. Payn*, 20 Johns. (N. Y.) 3; *Jackson v. Dickenson*, 15 Johns. (N. Y.) 309, 8 Am. Dec. 336; *Jackson v. Bull*, 1 Johns. Cas. (N. Y.) 81; *Lathrop v. Ferguson*, 22 Wend. (N. Y.) 216; *Nellis v. Lathrop*, 22 Wend. (N. Y.) 121, 122, 34 Am. Dec. 285; *People's Savings Bank v. Hodgon*, 64 Cal. 95; *Rugles v. First Nat. Bank*, 43 Mich. 192; *Gamble v. Horr*, 40 Mich. 561; *Barnard v. Wilson*, 74 Cal. 512, 16 Pac. 307; *Champion v. Hinkle*, 45 N. J. Eq. (18 Stew.) 162, 16 Atl. 701, 12 N. J. L. J. 87; *Moulton v. Cornish*, 61 Hun (N. Y.) 438, 16 N. Y. Supp. 267, 41 N. Y. S. R. 41.

The purchaser at a mortgage foreclosure sale takes the place of the mortgagee in strict foreclosure at common law. *Champion v. Hinkle*, 45 N. J. Eq. (18 Stew.) 162, 16 Atl. 701, 12 N. J. L. J. 87. See *post*, chap. xxxv. The whole title vests in him on his receipt of a deed to the premises from the officer making the sale; and the

title of such purchaser relates back to the time of the execution of the mortgage foreclosed, and he succeeds as well to the title and estate acquired by the mortgagee by the delivery of the mortgage deed as to the estate the mortgagor had at the time of the execution of the mortgage. *Champion v. Hinkle*, 45 N. J. Eq. (18 Stew.) 162, 16 Atl. 701, 12 N. J. L. J. 87.

The purchaser's title is adverse to an estate created by the conveyance of the land by the mortgagor, subsequent to the execution of the mortgage; and the purchaser's failure to appear in the probate court and ask for distribution to himself on settlement of such estate cannot prejudice his title. *Barnard v. Wilson*, 74 Cal. 512, 16 Pac. 307.

⁴³ *Arterburn v. Beard*, 86 Neb. 733, 126 N. W. 379; *King v. McCully*, 38 Pa. St. 76. See *Rector v. Mack*, 93 N. Y. 488, 45 Am. Rep. 260; *Davis v. Connecticut Mut. Life Ins. Co.* 84 Ill. 508; *Wykes v. City of Caldwell*, 71 Kan. 459, 80 Pac. 941; *Nichols v. Tingstad*, 10 N. D. 172, 86 N. W. 694; *O'Brien v. Kluever*, 4 Neb. (Unof.) 571, 95 N. W. 595.

became the purchaser. In an action to restrain her from obstructing the light and air to the windows of said church, it was held that under her foreclosure deed, Mrs M. acquired an absolute title, unincumbered by the easement, that she owed no duty to the plaintiff or mortgagee, requiring her to pay off the mortgage, and that there were no equitable rights against her which would prevent her from asserting her title.⁴⁴ It seems that in such a case the plaintiff, to save its easement, should have appeared in the foreclosure suit, and bid the full amount of the mortgage debt and costs upon the sale, subject to the easement.⁴⁵

§ 713. Time for redemption—Effect on title of purchaser.—In those states where a period of time is allowed for redemption, after the sale of the premises under a mortgage foreclosure, a purchaser of land at such sale requires no legal title, nor right to be invested with a legal title, until the period for redemption has expired.⁴⁶ He cannot maintain an ejectment or other possessory action on his certificate of purchase,⁴⁷ for he will not be entitled to possession until the officer making the sale has executed and delivered to him a deed of the premises.⁴⁸

He acquires no title to the premises until the period for redemption has passed, and he is entitled to his deed. His deed, when executed, will relate back to the time of the sale in order to cut off intervening incumbrances. His title will become absolute only when his right to a deed accrues; until such time, he will have only an unmaturing right to a

⁴⁴ *Rector v. Mack*, 93 N. Y. 488, 45 Am. Rep. 260.

⁴⁵ *Rector v. Mack*, 93 N. Y. 488, 45 Am. Rep. 260.

⁴⁶ *Rockwell v. Servant*, 63 Ill. 424; *Delahay v. McConnel*, 5 Ill. (4 Scam.) 156; *Bartlett, as trustee, etc. v. Amberg, as receiver, etc.* 92 Ill. App. 377; *Schaeppi v. Bartholomee*,

217 Ill. 105, 1 L.R.A.(N.S.) 1079, 75 N. E. 447. See *Carroll v. Haigh*, 108 Ill. App. 264.

⁴⁷ *Rockwell v. Servant*, 63 Ill. 424.

⁴⁸ *O'Brian v. Fry*, 82 Ill. 87, 274; *Bennett v. Matson*, 41 Ill. 333; *Purser v. Cady*, 120 Cal. 214, 52 Pac. 489. See *Costigan v. Truesdell*, 119 Ky. 70, 115 Am. St. Rep. 241, 83 S.

deed.⁴⁹ Under the Massachusetts statute it seems that it is not essential that a limitation to the time for redemption be expressly fixed, though in some cases it has been held that this omission has left the mortgage without foundation for foreclosure.⁵⁰

§ 714. All fixtures pass to purchaser under referee's deed.—The rules as to fixtures which pass to a purchaser on a mortgage foreclosure sale are the same as those which govern a conveyance from a grantor to a grantee.⁵¹ Whatever is attached to the freehold and would pass under a deed as between a vendor and a vendee, will pass as between a mortgagor and a mortgagee.⁵² When a mortgagor, subsequently to the execution of a mortgage, places machinery or other fixtures upon the mortgaged premises, the purchaser of such premises, at a foreclosure sale, will, therefore, acquire title to the fixtures as a part of the realty.⁵³

W. 98; *Dolan v. Midland Blast Furnace Co.* 126 Iowa, 254, 100 N. W. 45.

⁴⁹ *Stephens v. Illinois Mutual Fire Ins. Co.* 43 Ill. 327, 331. See *Johnson v. Baker*, 38 Ill. 98, 87 Am. Dec. 293; *Sweezy v. Chandler*, 11 Ill. 445.

⁵⁰ *Shepard v. Richardson*, 145 Mass. 32, 11 N. E. 738.

⁵¹ *Snedeker v. Warring*, 12 N. Y. 170, 174. See *Bishop v. Bishop*, 11 N. Y. 123, 126, 62 Am. Dec. 68; *Bank of Utica v. Finch*, 3 Barb. Ch. (N. Y.) 293, 299, 49 Am. Dec. 175; *Robinson v. Preswick*, 3 Edw. Ch. (N. Y.) 246; *Main v. Schwarzwaelder*, 4 E. D. Smith, (N. Y.) 273; *Winslow v. Merchants' Ins. Co.* 45 Mass. (4 Metc.) 306, 38 Am. Dec. 368; *Union Bank v. Emerson*, 15 Mass. 159; *Longstaff v. Meagoe*, 2 Ad. & E. 167; *Young v. Chandler*,

102 Me. 251, 66 Atl. 539. See *ante*, §§ 490, 491, 492.

⁵² *Miller v. Plumb*, 6 Cow. (N. Y.) 665, 16 Am. Dec. 456; *Robinson v. Preswick*, 3 Edw. Ch. (N. Y.) 246; *Union Bank v. Emerson*, 15 Mass. 159.

⁵³ *Voorhees v. McGinnis*, 48 N. Y. 278; *Snedeker v. Warring*, 12 N. Y. 170; *Bishop v. Bishop*, 11 N. Y. 123, 62 Am. Dec. 68; *Rice v. Dewey*, 54 Barb. (N. Y.) 455; *Gardner v. Finley*, 19 Barb. (N. Y.) 317; *Miller v. Plumb*, 6 Cow. (N. Y.) 665, 16 Am. Dec. 456; *Robinson v. Preswick*, 3 Edw. Ch. (N. Y.) 246; *Babcock v. Utter*, 32 How. (N. Y.) Pr. 439, 1 Abb. App. Dec. (N. Y.) 27; *Sullivan v. Toole*, 26 Hun (N. Y.) 203; *Main v. Schwarzwaelder*, 4 E. D. Smith (N. Y.) 273; *Sands v. Pfeiffer*, 10 Cal. 258; *Clore v. Lambert*, 78 Ky. 224;

Thus, the owner of real estate, with a flouring mill thereon, which was subject to a mortgage, procured new machinery for such mill on credit, upon an agreement that the title to the machinery should not pass to the purchaser until it was fully paid for. The machinery was attached to the realty as was intended. The purchaser upon the foreclosure of such mortgage was held to take title to the machinery as against the vendor of it, notwithstanding the contract and the vendee's failure to pay therefor.⁵⁴

In determining whether chattels affixed to land will pass under a mortgage of the realty, it is immaterial whether such chattels were attached before or after the execution of the mortgage, because, as a general rule, they become bound by the mortgage whenever they become a part of the realty.⁵⁵

Wight v. Gray, 73 Me. 297; *Union Bank v. Emerson*, 15 Mass. 159; *Lackas v. Bahl*, 43 Wis. 53; *Canning v. Owen*, 22 R. I. 624, 84 Am. St. Rep. 858, 48 Atl. 1033; *Gunderson, as rec'r, etc. v. Swarthout*, 104 Wis. 186, 76 Am. St. Rep. 860, 80 N. W. 465; *Lord v. Detroit Savings Bank*, 132 Mich. 510, 93 N. W. 1063. See *Equitable Guarantee & Trust Co. as trustee, etc. v. Knowles*, 8 Del. Ch. 106, 67 Atl. 961.

For a full collection of the authorities as to what are, and what are not, fixtures, see *ante*, §§ 490, 491, 492. See *Walker v. Sherman*, 20 Wend. (N. Y.) 636; also *Potter v. Cromwell*, 40 N. Y. 287, 100 Am. Dec. 485; *Butler v. Page*, 48 Mass. (7 Metc.) 40, 39 Am. Dec. 757; *Winslow v. Merchants' Ins. Co.* 45 Mass. (4 Metc.) 306, 38 Am. Dec. 368; *Noble v. Bosworth*, 36 Mass. (19 Pick.) 314; *Crane v. Brigham*, 11 N. J. Eq. (3 Stockt.) 29; *Teaff v. Hewitt*, 1 Ohio St. 511, 529, 530, 59 Am. Dec. 734; *Christian v. Dripps*, 28 Pa. St. 271; *Hill v.*

Wyntworth, 28 Vt. 428; *Walmsley v. Milne*, 7 C. B. N. S. 115, 29 L. J. C. P. 97; 6 Jur. N. S. 125, 97 Eng. C. L. 114; *Lancaster v. Eve*, 5 C. B. N. S. 717, 28 L. J. C. P. 235, 5 Jur. N. S. 683, 94 Eng. C. L. 717. As to removed fixtures, see *ante*, § 302.

⁵⁴ *Bass Foundry, &c. Works v. Gallentine*, 99 Ind. 525.

⁵⁵ *Snedeker v. Warring*, 12 N. Y. 170; *Rice v. Dewey*, 54 Barb. (N. Y.) 455; *Gardner v. Finley*, 19 Barb. (N. Y.) 317; *Sullivan v. Toole*, 26 Hun (N. Y.) 203; *Phinney v. Day*, 76 Me. 83; *Corliss v. McLagin*, 29 Me. 115; *Butler v. Page*, 48 Mass. (7 Metc.) 40, 39 Am. Dec. 757; *Winslow v. Merchants' Ins. Co.* 45 Mass. (4 Metc.) 306, 38 Am. Dec. 368; *Peirce v. Goddard*, 39 Mass. (22 Pick.) 559, 33 Am. Dec. 764; *Curry v. Schmidt*, 54 Mo. 515; *Powers v. Dennison*, 30 Vt. 752; *Preston v. Briggs*, 16 Vt. 124. See *Williams v. Chicago Exhibition Co.* 188 Ill. 19, 58 N. E. 611.

§ 715. **Exceptions to above rule.**—To this general rule, however, there are some exceptions, as where chattels are attached to real estate with the intention that they shall not thereby become a part of the freehold; such intention will control, as a general rule, and a mortgage of the real estate will not bind such chattels.⁵⁶ And it has been held that a mortgage will not bind personal property which has been attached to the freehold subsequently to the execution of the mortgage, where equities in favor of third persons require that it should continue to be considered as personal property.⁵⁷ It is well settled that where, by the express agreement of the owner of the equity of redemption and the owner of chattels affixed to the land, such chattels are to remain personal property, they will not become a part of the realty, but will be subject to removal by the owner at any time.⁵⁸

In *Rowland v. West*,⁵⁹ it is held that a purchaser at a sale upon foreclosure of a mortgage upon a mill to which chattels have been affixed since the execution of the mortgage, cannot recover such chattels from the mortgagee in a mortgage upon such chattels, executed and duly filed before the execution of the real estate mortgage, and before the chattels were converted into fixtures.

A greenhouse with furnaces placed on leased property by the tenant with the intention of removing the same when the lease expires, and which can be removed without injury to the estate, will not pass to the purchaser on foreclosure against the landlord.⁶⁰

⁵⁶ See *Sheldon v. Edwards*, 35 N. Y. 279; *Ford v. Cobb*, 20 N. Y. 344; *Bernheimer v. Adams*, 70 App. Div. 114, 75 N. Y. Supp. 93.

⁵⁷ See *Tift v. Horton*, 53 N. Y. 377, 13 Am. Rep. 537; *Voorhees v. McGinnis*, 48 N. Y. 278. See also *J. L. Mott Iron Works v. Middle States Loan, Building & Construction Co.* 17 App. D. C. 584.

⁵⁸ *Tift v. Horton*, 53 N. Y. 377,

13 Am. Rep. 537; *Ford v. Cobb*, 20 N. Y. 344; *Mott v. Palmer*, 1 N. Y. 564; *Farrar v. Chauffetete*, 5 Den. (N. Y.) 527; *Smith v. Benson*, 1 Hill (N. Y.) 176. See *Condit v. Goodwin*, 44 Misc. 312, 89 N. Y. Supp. 827.

⁵⁹ 62 Hun (N. Y.) 583, 17 N. Y. Supp. 330, 43 N. Y. S. R. 698.

⁶⁰ *Royce v. Latshaw*, 15 Colo. App. 420, 62 Pac. 627.

Chandeliers and brackets placed in a house by one other than the owner of the property are moveables and do not pass to the purchaser of the property at foreclosure sale.⁶¹

§ 716. All permanent improvements pass under referee's deed.—All additions of a permanent character by way of improvements made on mortgaged premises by the mortgagor or the owner of the equity of redemption, are regarded as part of the mortgaged estate and will inure to the benefit of the holder of the mortgage, and will pass to the purchaser on a foreclosure sale.⁶² Thus, where a mortgagor, while the owner of the equity of redemption, erected a house upon the mortgaged premises, without any agreement with the mortgagee, it was held that it became a part of the realty and passed with it to the purchaser at the sale on the foreclosure of the mortgage;⁶³ and the same rule has been held

⁶¹ *L'Hote & Co. v. Fulham*, 51 La. Ann. 780, 25 So. 655.

⁶² *Baird v. Jackson*, 98 Ill. 78; *Wood v. Whelen*, 93 Ill. 153; *Englehart-Hitchcock Co. v. Central Investment Co.* 136 Ga. 564, 71 S. E. 787. See *Ozark v. Adams*, 73 Ark. 227, 83 S. W. 920; *Baird v. Jackson*, 98 Ill. 78; *Wood v. Whelen*, 93 Ill. 157; *Matzon v. Griffin*, 78 Ill. 477; *Dooley v. Crist*, 25 Ill. 551; *Mann v. Mann*, 49 Ill. App. 472; *Townsend v. Payne*, 42 La. An. 909, 8 So. 626; *Partridge v. Hemenway*, 89 Mich. 454, 28 Am. St. Rep. 322, 50 N. W. 1084; *Higginbottom v. Benson*, 24 Neb. 461, 8 Am. St. Rep. 211, 39 N. W. 418; *Turner v. Mebane*, 110 N. C. 413, 28 Am. St. Rep. 697, 14 S. E. 974; *Dakota Loan & T. Co. v. Parmalee*, 5 S. D. 341, 58 N. W. 811.

Personalty affixed to freehold cannot be claimed by the purchaser where, by express agreement be-

tween the mortgagor and the owner of the chattel, its character as personality was not to be changed, but was to continue and be subject to the right of removal by such owner on failure of performance of conditions of sale. *Brand v. McMahon*, 38 N. Y. S. R. 576, 15 N. Y. Supp. 39.

The supreme court of Louisiana, in *Townsend v. Payne*, 42 La. An. 909, 8 So. 626, say that movable property placed upon a plantation before the sale of an undivided half thereof, together with the movable property, to one who executes his purchase-money mortgage therefor, is liable to seizure by the holder of notes secured by the mortgage; but movable property placed upon it by the vendor and vendee after entering into a planting partnership is not so liable.

⁶³ *Matzon v. Griffin*, 78 Ill. 477; *Dooley v. Crist*, 25 Ill. 551.

to apply to a building erected upon mortgaged premises by the husband of the mortgagor.⁶⁴

Where a mortgagor erected a frame building by the side of his mill, to be used as an office in connection with the mill, the building was held to be a fixture, although it was erected after the mortgage was given and was intended to be only temporary, and was neither attached to the mill nor secured to the ground, but rested upon wooden blocks standing upon the surface of the earth.⁶⁵ Where the owner of the equity of redemption makes improvements upon land that is mortgaged, he will not be entitled to an allowance for them as against the mortgagor, but in some cases he may be allowed for such improvements out of the surplus moneys.⁶⁶

The mortgagor is not entitled to any abatement for expenses incurred for betterments⁶⁷ or improvements of any kind.⁶⁸

⁶⁴ *Wright v. Gray*, 73 Me. 297.

⁶⁵ *State Savings Bank v. Kercheval*, 65 Mo. 682, 27 Am. Rep. 310. See also *Butler v. Page*, 48 Mass. (7 Metc.) 40, 39 Am. Dec. 757.

As to what improvements are fixtures see *Stockwell v. Campbell*, 39 Conn. 362, 12 Am. Rep. 393; *Arnold v. Crowder*, 81 Ill. 56, 25 Am. Rep. 260; *Ottumwa Woolen Mill Co. v. Hawley*, 44 Iowa, 57, 24 Am. Rep. 719; *McConnell v. Blood*, 123 Mass. 47, 25 Am. Rep. 12; *Richardson v. Borden*, 42 Miss. 71, 2 Am. Rep. 595; *Jarechi v. Philharmonic Society*, 79 Pa. St. 403, 21 Am. Rep. 78; *Meigs' Appeal*, 62 Pa. St. 28, 1 Am. Rep. 372; *Hutchins v. Masterson*, 46 Tex. 551, 26 Am. Rep. 286.

⁶⁶ *Wharton v. Moore*, 84 N. C. 479, 37 Am. Rep. 627. See *Rice v. Dewey*, 54 Barb. (N. Y.) 455; *Union Water Co. v. Murphy*, 22 Cal. 621; *Baird v. Jackson*, 98 Ill. 78; *Martin v. Beatty*, 54 Ill. 100;

McCumber v. Gilman, 15 Ill. 381; *Childs v. Dolan*, 87 Mass. (5 Allen) 319. See also *Decker v. Zeluff*, 23 App. Div. 107, 48 N. Y. Supp. 385.

⁶⁷ See 2 Kerr on Real Prop. § 1316.

⁶⁸ *Mann v. Mann*, 49 Ill. App. 472; *Dakota Loan & T. Co. v. Parmalee* (S. D.) 58 N. W. 811.

Changing and remodeling a mortgaged house, by one upon whose premises it has been moved by a grantee of the mortgagor, newly plastering and completely finishing the same, and adding a new addition and new porches thereto, and placing the entire building on a stone foundation, at a cost of about \$600, does not destroy the identity of the mortgaged building so as to defeat the mortgagee's right to subject it to the payment of so much of his mortgage debt as remains unpaid after exhausting the mortgaged lot on which the building

§ 717. All emblements pass under referee's deed.—The crops growing on the land, as well as the land, are held as a security for the mortgage debt,⁶⁹ and on the foreclosure of the mortgage, whatever crops are then growing upon the mortgaged premises, even if planted subsequently to the making of the mortgage, will pass to the purchaser at the sale, whether they were planted by the mortgagor or his tenant,⁷⁰ free from all claim upon them by such mortgagor or tenant;⁷¹

originally stood. *Dakota Loan & T. Co. v. Parmalee*, 5 S. D. 341, 58 N. W. 811.

A *bona fide* purchaser at a foreclosure sale of a senior mortgage, the junior mortgagees not having been made parties, is, in a suit against him by the junior mortgagees to require him to redeem, entitled to credit for improvements, and should not be charged with the rental value of the premises during his possession. *Higginbottom v. Benson*, 24 Neb. 461, 8 Am. St. Rep. 211, 39 N. W. 418.

A *bona fide* occupant under claim of title, is entitled to compensation, at least as a set-off, against mesne profits; but knowledge or notice of adversary rights is fatal to the claim for compensation, and a mortgagee who repudiates the relation, or a purchaser from him with notice, is regarded as a wrong-doer, and is not entitled to compensation. *Gresham v. Ware*, 79 Alabama, 192.

The purchaser of a railroad under a mortgage cannot claim to use a depot under a contract made by the mortgagor after the execution of the mortgage without payment of the rental provided for in the contract. *St. Joseph Union Depot Co. v. Chicago, R. I. & P. R. Co.* 131 Mo. 291, 31 S. W. 908.

⁶⁹ See *Gillett v. Balcom*, 6 Barb. (N. Y.) 370; *Shepard v. Philbrick*, 2 Den. (N. Y.) 174; *Lane v. King*, 8 Wend. (N. Y.) 584, 24 Am. Dec. 105; *Toby v. Reed*, 9 Conn. 216; *Jones v. Thomas*, 8 Blackf. (Ind.) 428; *Hughes v. Graves*, 1 Litt. (Ky.) 317; *Winslow v. Merchants' Insurance Co.* 45 Mass. (4 Metc.) 310, 38 Am. Dec. 368; *Cassilly v. Rhodes*, 12 Ohio, 88; *Crews v. Pendleton, v. Leigh* (Va.) 297, 305, 19 Am. Dec. 750.

⁷⁰ And where a tenant, who rented the land pending a foreclosure, sows a crop of wheat after judgment in foreclosure, and the wheat is not ready to harvest until after the foreclosure sale and the sheriff's deed passes, as against the tenant, the crop belongs to the purchaser at such sale. *Goodwin v. Smith*, 49 Kan. 351, 31 Pac. 153, 17 L.R.A. 284, 33 Am. St. Rep. 373. See *Nichols v. Lappin*, 105 Mo. App. 401, 79 S. W. 995; *Rardin v. Baldwin, as adm'r, etc.* 9 Kan. App. 516, 60 Pac. 1097.

⁷¹ *Gillett v. Balcom*, 6 Barb. (N. Y.) 370. *Wallace v. Cherry*, 32 Mo. App. 436; *Skilton v. Harrel*, 5 Kan. App. 753, 48 Pac. 177; *Reiley v. Carter*, 75 Miss. 798, 65 Am. St. Rep. 621, 23 So. 435; *Jones v. Adams*, 37 Or. 473, 50 L.R.A. 388, 82 Am. St. Rep. 766, 62 Pac. 16.

and on a proper application, under some circumstances, the court will provide for their preservation until possession is given to the purchaser.⁷² But the purchaser at a foreclosure sale cannot, before the sale is confirmed and before he has acquired possession of the land, maintain an action in replevin for crops growing thereon at the time of the sale but afterwards severed from the premises by the person in possession.⁷³

Where, however, the foreclosure is instituted and a sale is ordered after the severance of the crops,⁷⁴ or where a standing crop is fully matured at the time of the sale,⁷⁵ the title thereto will not pass, under such proceedings, to the mortgagee or the purchaser. The purchaser at a mortgage foreclosure sale will be entitled to the crops growing at the time of the sale, in preference to a person claiming under the mortgagor whose claim originated subsequently to the execution of the mortgage.⁷⁶ And it has been held that a person purchasing the premises upon the foreclosure of a mortgage is entitled to the growing crops in preference to a person pur-

See *Shepard v. Philbrick*, 2 Den. (N. Y.) 174; *Lane v. King*, 8 Wend. (N. Y.) 584, 24 Am. Dec. 105; *Jones v. Thomas*, 8 Blackf. (Ind.) 428; *Ledyard v. Phillips*, 47 Mich. 305; *Ruggles v. First Nat. Bank of Centreville*, 43 Mich. 192; *Howell v. Schenck*, 24 N. J. L. (4 Zab.) 89; *Crews v. Pendleton*, 1 Leigh (Va.) 297, 19 Am. Dec. 750. But see *Aldrich v. Bank of Ohio*, 64 Neb. 276, 57 L.R.A. 920, 97 Am. St. Rep. 643, 89 N. W. 772; *Cassell, as rec'r, etc. v. Ashley*, 3 Neb. (Unof.) 787, 92 N. W. 1035.

⁷² *Ruggles v. First Nat. Bank of Centreville*, 43 Mich. 192.

⁷³ *Woehler v. Endter*, 46 Wis. 301.

⁷⁴ *Buckout v. Swift*, 27 Cal. 438,

87 Am. Dec. 90; *Codrington v. Johnstone*, 1 Beav. 520.

⁷⁵ *Richards v. Knight*, 78 Iowa, 69, 42 N. W. 584, 4 L.R.A. 453; *Caldwell v. Alsop*, 48 Kan. 571, 29 Pac. 1150, 17 L.R.A. 782.

⁷⁶ *Shepard v. Philbrick*, 2 Den. (N. Y.) 174; *Stewart v. Doughty*, 9 Johns. (N. Y.) 112; *Whipple v. Foot*, 2 Johns. (N. Y.) 418, 3 Am. Dec. 442; *Lane v. King*, 8 Wend. (N. Y.) 584, 24 Am. Dec. 105; *Anderson v. Strauss*, 98 Ill. 485; *Jones v. Thomas*, 8 Blackf. (Ind.) 428; *Howell v. Schenck*, 24 N. J. L. (4 Zab.) 89; *Parker v. Storts*, 15 Ohio St. 351; *Crews v. Pendleton*, 1 Leigh (Va.) 297, 19 Am. Dec. 750; *Wootton v. White*, 90 Md. 64, 78 Am. St. Rep. 425, 44 Atl. 1026.

chasing the same premises at a sale subsequently made under a decree in bankruptcy.⁷⁷

But when the crops are reserved at a sale by special announcement, duly authorized, they will not pass to the purchaser.⁷⁸ This rule is placed upon the grounds, that while the mortgagee is not bound to sell in parcels, unless the mortgaged premises are described in parcels,⁷⁹ yet that he may do so where the premises are so situated that he can sell in parcels; that he may, if he chooses, even release a portion of the premises and sell the balance; that there is no reason why he may not sell the same portion before releasing any; and that in such case the mortgage is a lien upon the whole premises, including the growing crops, and at the time of the sale the mortgagee may announce that he will not sell the growing crops, but will sell the balance.⁸⁰

But the sheriff, or other officer making the sale, has no authority to reserve the growing crops, and where he makes such a reservation, without authority contained in the mortgage or in the decree of sale, the reservation will be without effect and the sale will pass both the land and the growing crops to the purchaser; and in those cases where he has authority, such reservation will probably be of no avail unless it is expressed in his deed.⁸¹

Where a vendee of the mortgagor assumes the payment of a mortgage on the lands, he occupies the position of a mortgagor in possession, and the growing crops planted by him while in possession pass to the purchaser on foreclosure sale as accessories to the lands.⁸² But one who buys a fully matured crop standing on the mortgaged premises and unharvested, from the mortgagor before the commencement of

⁷⁷ *Gillett v. Balcom*, 6 Barb. (N. Y.) 370.

⁷⁸ *Sherman v. Willett*, 42 N. Y. 146.

⁷⁹ See *Griswold v. Fowler*, 24 Barb. (N. Y.) 135, 4 Abb. (N. Y.) Pr. 238; *Lamerson v. Marvin*, 8 Barb. (N. Y.) 9.

⁸⁰ *Sherman v. Willett*, 42 N. Y. 146.

⁸¹ *Howell v. Schenck*, 24 N. J. L. (4 Zab.) 89.

⁸² *Hayden v. Burkemper*, 101 Mo. 644, 20 Am. St. Rep. 643, 14 S. W. 767, aff'g 40 Mo. App. 346.

foreclosure proceedings but after default on the mortgage, obtains a good title to such crop as against the receiver appointed in such foreclosure proceedings, or the purchaser on sale in foreclosure.⁸³ It has been held, however, that one who purchases on execution sale nursery trees and bushes raised for sale on mortgaged premises, after foreclosure and sale perfected by the passing of the deed, cannot take them away without liability to the mortgagee, or the purchaser under the foreclosure sale, although he might have taken them away before the title under such sale was perfected.⁸⁴

§ 718. Right of purchaser to rents.—The mortgagor will be entitled to the possession of the land and to the rents and profits thereof, until the mortgagee takes possession or institutes proceedings to subject the rents and profits to his claim.⁸⁵ Upon a mortgage foreclosure sale the purchaser does

⁸³ *Caldwell v. Alsop*, 48 Kan. 571, 29 Pac. 1150, 17 L.R.A. 782.

⁸⁴ *Batterman v. Albright*, 122 N. Y. 484, 25 N. E. 856, 11 L.R.A. 800, 19 Am. St. Rep. 510.

⁸⁵ *Rudolph v. Herman*, 4 S. D. 283, 56 N. W. 901; *Grosvenor v. Bethel*, 93 Tenn. 577, 26 S. W. 1019; *Butler v. Page*, 48 Mass. (7 Metc.) 40, 42, 39 Am. Dec. 757. See *Hele v. Bexley*, 20 Beav. 127; *Higgins v. York Buildings Co.* 2 Atk. 107; *Drummond v. Duke of St. Albans*, 5 Ves. 438; *Colman v. Duke of St. Albans*, 3 Ves. 25. See *ante*, § 681.

In Delaware purchaser entitled to rents accruing after day of sale on the foreclosure of mortgage, under a decree of the United States circuit court; the Delaware statute for the apportionment of rents in the case of sheriff's sales does not apply. *Williams v. Cochran*, 8 Houst. (Del.) 420, 31 Atl. 1050.

In South Dakota mortgagor of property sold under foreclosure is

entitled to the rents and profits thereof during the year of redemption under Dak. Comp. L. § 5431, providing that the possession of the premises sold under foreclosure shall not be delivered to the purchaser until after the expiration of one year from the sale. *Rudolph v. Herman* (S. D.) 56 N. W. 901.

A purchaser who fails to record within thirty days after the expiration of the equity of redemption, and who leaves the debtor in possession of the property, cannot claim the crops thereon which are attached as the debtor's property. *Wolcott v. Hamilton*, 61 Vt. 79, 17 Atl. 39.

The purchaser at a sale of real estate under a trust deed is not entitled to the rents accruing on the property between the date of his purchase and his acceptance of a deed and going into possession, where he paid only a portion of the

not acquire the title to the premises nor a right to the possession thereof, until the delivery of the deed by the officer making the sale; until that time the owner of the equity of redemption will be entitled to the possession of the land and to its rents and profits.⁸⁶

The purchaser is generally not entitled to possession, nor to the rents and profits, until he has demanded such possession under his deed.⁸⁷ Where a person is in possession under a purchase at a former foreclosure sale which was not confirmed, he will be entitled to the rents only from the date of the confirmation of the report of the last sale.⁸⁸ A purchaser, under a referee's deed conveying the premises subject to "leases, if any, tenancies of the present occupants," cannot maintain an action against a tenant in possession who has never attorned to him.⁸⁹ A mortgagee who purchases the equity of redemption on the foreclosure sale of his mortgage is not liable to a junior mortgagee for rents and profits.⁹⁰

Until such time as the deed is delivered the tenant will not be affected by the mortgage foreclosure proceedings.⁹¹ But as soon as the title passes the purchaser is entitled to the rents

purchase money down, without paying any interest on the balance, and his delay in obtaining possession was his own fault. *Grosvenor v. Bethel*, 93 Tenn. 577, 26 S. W. 1019.

⁸⁶ *Mitchell v. Bartlett*, 51 N. Y. 447, aff'g 52 Barb. (N. Y.) 319; *Varnum v. Winslow*, 106 Iowa, 287, 76 N. W. 708; *Condon v. Marley*, 7 Kan. App. 383, 51 Pac. 924. See *Jackson v. King*, 62 Kan. 850, 62 Pac. 655. See also *Mutual Life Ins. Co. v. Blach*, 4 Abb. (N. Y.) N. C. 200; *Astor v. Turner*, 11 Paige Ch. (N. Y.) 436, 43 Am. Dec. 766; *Clason v. Corley*, 5 Sandf. (N. Y.) 447; *Nichols v. Foster*, 9 N. Y. Week. Dig. 468; *Taliaferro v. Gay*, 78 Ky. 496

⁸⁷ *Mitchell v. Bartlett*, 51 N. Y. 447, aff'g 52 Barb. (N. Y.) 319; *Astor v. Turner*, 11 Paige Ch. (N. Y.) 436, 43 Am. Dec. 766; *Clason v. Corley*, 5 Sandf. (N. Y.) 447; *Continental Insurance Co. v. Reeve*, 134 N. Y. Supp. 78.

⁸⁸ *Taliaferro v. Gay*, 78 Ky. 496. See *Mitchell v. Bartlett*, 51 N. Y. 447, aff'g 52 Barb. (N. Y.) 319. See *ante*, § 681.

⁸⁹ *Wacht v. Erskine*, 61 Misc. 96, 113 N. Y. Supp. 130.

⁹⁰ *Gault v. Equitable Trust Co.* 100 Ky. 578, 38 S. W. 1065.

⁹¹ See *Richards v. Knight*, 78 Iowa, 69, 42 N. W. 584, 4 L.R.A. 453; *Whalen v. White*, 25 N. Y. 462.

and profits, and may recover the rent from a lessee of the mortgagor as the same falls due under the lease, notwithstanding payment thereof by the lessee to the mortgagor after notice of the rights of such purchaser;⁹² and in those cases where the rents have been paid in advance to a receiver *pendente lite*, to a time beyond the delivery of the deed upon the sale under the mortgage, the purchaser is entitled to all rents from the time the deed was delivered.⁹³

There are few general rules of law without exceptions, and there is an exception to the above rule, in those cases where a mortgagee of lands purchases them at his own foreclosure sale for the full amount of the debts and costs. In such a case he is not entitled to the rents and profits previously collected and in the hands of a receiver appointed in the foreclosure proceedings, nor to rents paid before he obtains title by deed.⁹⁴

§ 719. Same—During period of redemption.—Where the rent becomes due and payable between the day of sale and the time when the purchaser becomes entitled to the possession, it belongs to the owner of the equity of redemption, and not to the purchaser at the sale.⁹⁵ And this is true although

⁹² *Dunton v. Sharpe*, 70 Miss. 850, 11 So. 168; *Cowen v. Arnold*, 58 Hun (N. Y.) 437, 12 N. Y. Supp. 601, 35 N. Y. S. R. 134; *Clement v. Shipley*, 2 N. D. 430, 51 N. W. 414.

He is entitled to rents accruing under a lease for a term of years, as against one to whom the mortgagor assigned, after the execution of the mortgage, rent notes given before its execution for the rent of each year, since the rents pass under the mortgage as a hereditament. *Dunton v. Sharpe*, 70 Miss. 850, 11 So. 168.

A different rule prevails in Texas,

where a mortgagor can by leasing the premises and assigning his claim for rent, sever the rent from the land, so that a sale of the latter will not convey a right to demand the rent subsequently falling due under the lease. *Security Mortg. & T. Co. v. Gill*, 8 Tex. Civ. App. 358, 27 S. W. 835.

⁹³ *Cowen v. Arnold*, 58 Hun (N. Y.) 437, 35 N. Y. S. R. 134, 12 N. Y. Supp. 601.

⁹⁴ *Pacific Mut. L. Ins. Co. v. Beck* (Cal.) 35 Pac. 169.

⁹⁵ *Eggleston v. Hadfield*, 90 Ill. App. 11; *Kaston v. Paxton*, 46 Or. 308, 114 Am. St. Rep. 871, 80 Pac.

the owner does not redeem.⁹⁶ In some states however, under statutory provisions, the rents and profits go to the purchaser.⁹⁷ It has also been held, under statutory provision, that where a judgment debtor fails to redeem, he shall be liable to the purchaser for the rent of the premises, or for the use and occupation thereof, from the date of the sale.⁹⁸

But the general rule seems to be that where the amount realized on the sale of the premises is sufficient to satisfy the mortgage debt, the owner of the equity of redemption is entitled to the possession of the land and to the rents and profits accruing therefrom, as against the purchaser.⁹⁹ And this is true although the instrument expressly provides that the rents and profits shall belong to the purchaser,¹ since the rule is held to be one of public policy, the benefit of which cannot be waived by the parties to the mortgage.² The contrary rule prevails however where the land sells for less than the mort-

209; *Barilett, as trustee, etc. v. Amberg, as rec'r, etc.* 92 Ill. App. 377; *Traer v. Fowler*, 144 Fed. 810, 75 C. C. A. 540; *Astor v. Turner*, 11 Paige Ch. (N. Y.) 436, 43 Am. Dec. 766. See *Whalin v. White*, 25 N. Y. 462; *Miner v. Beckman*, 11 Abb. (N. Y.) Pr. N. S. 147, 42 How. (N. Y.) Pr. 33, 33 N. Y. Supr. Ct. (1 J. & S.) 67; *Clason v. Corley*, 5 Sandf. (N. Y.) 447. See *ante*, § 681.

⁹⁶ *Dix v. Lohman*, 105 Mo. App. 619, 80 S. W. 51.

⁹⁷ Cal. Code Civ. Proc. § 707; *Yndart v. Den*, 125 Cal. 85, 57 Pac. 761; *Walker v. McCusker*, 71 Cal. 594; Wash. Rem. & Bal. Code § 602, *Merz v. Mehner*, 67 Wash. 135, 120 Pac. 893. Rev. Code § 5549, *Whithed v. St. Anthony & Dakota Elevator Co.* 9 N. D. 224, 50 L.R.A. 254, 81 Am. St. Rep. 562, 83 N. W. 238.

⁹⁸ *Gale v. Parks*, 58 Ind. 117. See *Clements v. Robinson*, 54 Ind. 599.

⁹⁹ *Haigh v. Carroll*, 209 Ill. 576, 71 N. E. 317; *Cohn v. Franks*, 96 Ill. App. 206; *World Building, Loan & Investment Co. v. Marlin*, 151 Ind. 630, 52 N. E. 198; *Innes v. Linscheid*, 126 Ill. App. 27; *Tosetti Brewing Co. v. Goebel*, 23 Ind. App. 99, 54 N. E. 813. See *Talcott v. Peterson*, 63 Ill. App. 421; *Burleigh v. Keck*, 84 Ill. App. 607. But see *Equitable Trust Co. v. Wilson*, 200 Ill. 23, 65 N. E. 430.

¹ *Schaeppi v. Bartholomae*, 217 Ill. 105, 1 L.R.A.(N.S.) 1079, 75 N. E. 447; *Haigh v. Carroll*, 209 Ill. 576, 71 N. E. 317. See *Standish v. Murgrove*, 223 Ill. 500, 79 N. E. 161.

² *Dennis v. Moses*, 18 Wash. 537, 40 L.R.A. 302, 52 Pac. 333.

gage debt.³ However after the deficiency is paid off, the rents belong to the owner of the equity of redemption.⁴

§ 720. Same—Accounting for rents and profits.—The purchaser of lands on execution remaining in possession of land during the year following the sale of property under mortgage foreclosure is liable to account for the rent to the foreclosure purchaser.⁵ But in those cases where a sale under a power in a mortgage is completed, and the mortgage extinguished, the acceptance by the purchaser of a formal assignment of the mortgage will not cut down his right to the rents and profits which had become absolute as against the mortgagor; and he will not be liable to an action by the mortgagor for the sum due on the purchase.⁶ It is said by the supreme court of Washington⁷ that under the statute of that state,⁸ providing that the purchaser from the day of sale until a redemption, and the redemptioner from the day of redemption until another redemption, shall be entitled to the possession of the property, or to the rents or value of the use and occupation during the same period, if in possession of a tenant, a purchaser at a sale under foreclosure of a mortgage cannot be required to account at the suit of the mortgagor to redeem, for rents and profits arising from the use and occupation of the premises during the interval between the sale and redemption.

It is thought that it is not the duty of a purchaser from the mortgagee under a power of sale in the mortgage, to give notice to the mortgagors in respect to the liability of the mort-

³ *Russell v. Bruce*, 159 Ind. 553; *First National Bank v. Illinois Steel Co.* 174 Ill. 140, 51 N. E. 200; *Roach v. Glos*, 181 Ill. 440, 54 N. E. 1022. But see *Ray v. Henderson*, 210 Ill. 305, 71 N. E. 579; *Standish v. Musgrove*, 223 Ill. 500, 79 N. E. 161.

⁴ *Townsend v. Wilson*, 155 Ill. App. 303; *Stevens, as rec'r, etc. v.*

Hadfield, 178 Ill. 532, 52 N. E. 875.

⁵ *Edwards v. Johnson*, 105 Ind. 594, 5 N. E. 716.

⁶ *Walpole v. Quirk*, 143 Mass. 72, 9 N. E. 9.

⁷ *Hardy v. Herriott*, 11 Wash. 460, 39 Pac. 958.

⁸ 2 Hill's Wash. Code, § 519.

gagee to account to them for the rents and profits from the time he took possession under an abortive sale to himself until a valid exercise of the power, or to see to the application of the purchase money.⁹

§ 721. **Appeal and reversal—Effect on purchaser's title.**—If the court had jurisdiction of the parties and of the subject matter of the action and power to render a judgment, it will not be a valid objection to the title by the purchaser at the sale made under a decree of foreclosure, that such judgment was erroneous;¹⁰ his title will not be affected by any defects in the proceedings which render the judgment irregular, and in consequence of which, it may be set aside or reversed.¹¹ But where a sale is made under a void decree,

⁹ *Henderson v. Astwood*, P. C. A. C. 150.

¹⁰ *DeForest v. Farley*, 62 N. Y. 628; *Storm v. Smith*, 43 Miss. 497; *Armstrong v. Humphreys*, 5 S. C. 128.

¹¹ *Brevoort v. Brevoort*, 70 N. Y. 136, 140; *DeForest v. Farley*, 62 N. Y. 628. See *Clemens v. Clemens*, 37 N. Y. 59, 72; *Packer v. Rochester & S. R. R. Co.* 17 N. Y. 288; *Blakeley v. Calder*, 15 N. Y. 617; *Brainard v. Cooper*, 10 N. Y. 359; *Holden v. Sackett*, 12 Abb. (N. Y.) Pr. 473; *McMurray v. McMurray*, 60 Barb. (N. Y.) 117, 127; *Gaskin v. Anderson*, 55 Barb. (N. Y.) 259, 262, 7 Abb. (N. Y.) Pr. N. S. 1, 7; *Breese v. Bange*, 2 E. D. Smith (N. Y.) 474; *Wood v. Jackson*, 8 Wend. (N. Y.) 9, 22 Am. Dec. 603; *Estate of Fenn*, 8 N. Y. Civ. Proc. Rep. 206, 211; *sub nom. Price v. Fenn*, 3 Dem. (N. Y.) 341. See also *Alvord v. Beach*, 5 Abb. (N. Y.) Pr. 451; *Silleck v. Heydrick*, 2 Abb. (N. Y.) Pr. N. S. 57; *Hening v. Punnett*, Mortg. Vol. II.—67.

4 Daly (N. Y.) 543; *Graham v. Bleakie*, 2 Daly (N. Y.) 55; *Jordan v. VanEpps*, 19 Hun (N. Y.) 533; *Herbert v. Smith*, 6 Lans. (N. Y.) 493; *Minor v. Betts*, 7 Paige Ch. (N. Y.) 597; *Coit v. McReynolds*, 2 Robt. (N. Y.) 655; *Darvin v. Hatfield*, 4 Sandf. (N. Y.) 468; *In re Luce*, 17 N. Y. Week. Dig. 35; *Buckmaster v. Carlin*, 4 Ill. (3 Scam.) 104; *Bustard v. Gates*, 4 Dana (Ky.) 429; *Gossom v. Donaldson*, 18 B. Mon. (Ky.) 230, 68 Am. Dec. 723; *Benningfield v. Reed*, 8 B. Mon. (Ky.) 105; *Lampton v. Usher's Heirs*, 7 B. Mon. (Ky.) Wiltse Mortg.—2-8-13—Fred 57; *Gray v. Brignardello*, 68 U. S. (1 Wall.) 627, 17 L. ed. 693; *Bank of U. S. v. Voorhees*, 1 McL. C. C. 221; *Chamblee v. Broughton*, 120 N. C. 170, 27 S. E. 111. See also *Schieck v. Donohue*, 81 App. Div. 168, 80 N. Y. Supp. 739; *Hu-binger v. Central Trust Co. of New York*, 94 Fed. 788, 36 C. C. A. 494; *McGregor v. Eastern Building & Loan Assc.* 5 Neb. (Unof.) 563, 99

the purchaser will obtain no title.¹² The rule that a purchaser acquires a valid title, although the decree may be reversed on appeal, does not apply to an interlocutory decree nor to a conditional order, even if the conditions have not been fulfilled;¹³ nor does it apply where the party purchases on behalf of the judgment creditors.¹⁴

The rule that a *bona fide* purchaser at a foreclosure sale will receive a good title, although the proceedings were erroneous or irregular, holds good where the purchaser was a party to the suit,¹⁵ even though such purchaser had notice at the time of the sale, that an effort would be made to reverse the decree,¹⁶ and though an appeal had been taken from the judgment at the time of the sale, on which the judgment was subsequently reversed, a stay of proceedings not having been obtained pending such appeal.¹⁷

It has been held that where a person, not a party to the suit, is a purchaser at a foreclosure sale, the law does not

N. W. 509. But see *Woodard v. Bird*, 105 Tenn. 671, 59 S. W. 143.

¹² *Gossom v. Donaldson*, 18 B. Mon. (Ky.) 230, 68 Am. Dec. 723; *Storm v. Smith*, 43 Miss. 497.

¹³ *Gray v. Brignardello*, 68 U. S. (1 Wall.) 627, 17 L. ed. 693.

¹⁴ *Shelden v. Pruessner*, 52 Kan. 593, 35 Pac. 204.

Thus, the supreme court of California, in the case of *Withers v. Jacks* (79 Cal. 297, 12 Am. St. Rep. 143, 21 Pac. 824), say that in a contest between foreclosing mortgagors as to priority, where the one defeated takes an appeal without asking for or receiving a stay of proceedings, while the other mortgage is being foreclosed; and the judgment is reversed because of defects in the findings, and it is adjudged that the appeal does not affect the mortgagor in any manner; the foreclosure of the mortgage which is

given priority by the judgment is final, and a purchaser thereunder holds a good title as against any prior proceeding by the other mortgagee.

A purchaser for judgment creditors is not entitled to the protection of Kansas Civil Code, § 467; providing that the reversal of a judgment will not affect the title of a *bona fide* purchaser of land sold thereunder. *Sheldon v. Pruessner*, 52 Kan. 593, 35 Pac. 204.

¹⁵ *Hening v. Punnett*, 4 Daly (N. Y.) 543; *Splahn v. Gillespie*, 48 Ind. 397; *Gossom v. Donaldson*, 18 B. Mon. (Ky.) 230, 54 Am. Dec. 547.

¹⁶ *Irwin v. Jeffers*, 3 Ohio St. 389.

¹⁷ *Hening v. Punnett*, 4 Daly (N. Y.) 543. See *Ebert, as ex'r, etc. v. Hanneman*, 69 Misc. 223, 125 N. Y. Supp. 237.

require him to inspect the record and to see that it is free from errors;¹⁸ he is only required to ascertain that the court had jurisdiction, and that there is such a judgment or decree unreversed as would authorize the sale. The supreme court of Illinois said in the case of *Fergus v. Woodworth*,¹⁹ that "if such were not the rule, no one would become a purchaser at a judicial sale, and all competition would cease, and the plaintiffs would become the purchasers at their own price. Stability and confidence must be given to judicial sales to the fullest extent compatible with the interests of the parties, as well the purchaser as the defendant."

And it has been stated that a purchaser of property from a party to whom a deed under a foreclosure sale has regularly issued, is not affected by the revocation of the order confirming the sale, under proceedings commenced after he had acquired his title, although the order of revocation was made at the same term of court as the order of confirmation.²⁰

§ 722. Delivering possession of premises to purchaser.—A court of equity has authority to decree the possession of land, where a controversy regarding the title thereto has been properly brought within its jurisdiction,²¹ and the law will enforce its decree by its officers for the delivery of actual possession, whenever in pursuance of the decree such possession ought to be delivered.²² The power of a court to give possession to the purchaser at a foreclosure sale was at one time doubted, but it was finally exercised by the court of chancery.²³

¹⁸ See *Walter v. Brugger*, 78 S. W. 419.

¹⁹ 44 Ill. 374, 384.

²⁰ *Hollister v. Mann*, 40 Neb. 572, 58 N. W. 1126.

²¹ *Kershaw v. Thompson*, 4 Johns. Ch. (N. Y.) 609; *Irvine v. McRee*, 5 Humph. (Tenn.) 556, 49 Am. Dec. 468, 4 Kent Com. 184. See *State ex rel. Wyandotte Lodge*, No.

35, *I. O. O. F. v. Evans*, 176 Mo. 310, 75 S. W. 914.

²² *Valentine v. Teller*, *Hopk. Ch.* (N. Y.) 422.

²³ See *Bolles v. Duff*, 43 N. Y. 469, 473, 41 How. (N. Y.) Pr. 358; *Kershaw v. Thompson*, 4 Johns. Ch. (N. Y.) 609; *Thompson v. Campbell*, 57 Ala. 188.

The New York court of appeals held, in the case of *Bolles v. Duff*,²⁴ that by statute the court was given power over the whole subject, though the act was in a good degree declaratory. It has been said that a court of equity would fall short of doing complete justice, unless it placed the purchaser at a mortgage foreclosure sale in possession, as well as gave him a deed of the premises. Where the person ejected from the possession of the premises was a party to the suit, or came into possession under a party to the suit *pendente lite*, he can make no objection to such an order.²⁵

It may now be regarded as well settled that courts of equity, in the exercise of their ordinary and general chancery jurisdiction, where the possession of real property is involved, may, upon the consummation of a suit to enforce a lien thereon, do complete justice by putting a successful complainant into possession, if all the persons in interest were made parties to the suit; and that, on a sale in proceedings to foreclose a mortgage, or to enforce a lien, the court may extend the same relief to a purchaser under the decree of sale.²⁶ And the right of a purchaser to bring an action for the possession of the property sold is not effected by a delay of several years.²⁷ Where the statute provides that the purchaser shall have possession of the property from the date of purchase until resale or redemption, unless it is in the possession of a tenant,²⁸ this right will be enforced by the court.²⁹

However, if a person, pending the suit, enters into possession under one who did not derive his title to the premises from a party to the action, he cannot be turned out of possession under the decree. So in the case of a foreclosure sale,

²⁴ 43 N. Y. 469, 473.

²⁵ See *Kershaw v. Thompson*, 4 Johns. Ch. (N. Y.) 609; *Jones v. Hooper*, 50 Miss. 514. See *Creighton v. Paine*, 2 Ala. 159.

²⁶ *Harding v. LeMoyne*, 114 Ill. 65; *Suttles v. Sewell*, 105 Ga. 129, 31 S. E. 41.

²⁷ *Perc Marquette R. R. Co. v. Graham*, 136 Mich. 444, 99 N. W. 408. See *Prahl v. Rogers*, 127 Wis. 353, 106 N. W. 287.

²⁸ As does Was. Code Civ. Proc. § 519.

²⁹ *Debenture Corp. v. Warren*, 9 Wash. 312, 37 Pac. 451.

if a person in possession shows a *prima facie* right thereto paramount to the mortgage, the court will not attempt to decide questions affecting his legal title, and the possession must then be sought by proceedings at law.³⁰ It has been held in Wisconsin,³¹ that the statutory provision requiring that the purchaser at a foreclosure sale be let into possession on production of the sheriff's deed, must be construed as defining the rights of such purchaser after the confirmation of the sale.³² It seems that in some states a purchaser at a foreclosure cannot demand possession until the report of the officer making the sale has been confirmed by the court.³³ The rule is different, however, in New York,³⁴ and in Washington.³⁵

§ 723. Possession obtained by summary process.—It is usually provided in every judgment of foreclosure and sale, that the purchaser be let into possession on production of the deed of the officer making the sale; whether this provision is inserted in the judgment or not, the purchaser will be entitled to possession on compliance with the terms of the sale, and the court will have power to put him in such possession.³⁶ The purchaser will not be driven to an action at law to obtain

³⁰ *Harding v. LeMoyne*, 114 Ill. 65.

³¹ Wis. Rev. Stat. 3169.

³² *Welp v. Gunther*, 48 Wis. 543; *Wahler v. Endter*, 46 Wis. 301.

³³ *Howard v. Bond*, 42 Mich. 131.

³⁴ See *ante*, § 659.

³⁵ *State ex. rel. Steele as rec'r. etc. v. Northwestern & Pacific Hypotheek Bank*, 18 Wash. 118, 50 Pac. 1023.

³⁶ *Ludlow v. Lansing*, Hopk. Ch. (N. Y.) 231; *Dyer v. Kopper*, 59 Vt. 477, 59 Am. Rep. 742, 9 Atl. 4, See *Valentine v. Teller*, Hopk. Ch.

(N. Y.) 422; *Yates v. Hambly*, 2 Atk. 360.

The supreme court of Florida, in the case of *McLane v. Piaggie* (24 Fla. 71, 3 So. 823), say that a purchaser at a foreclosure sale should, upon demanding possession of the property purchased, exhibit to the party in possession the master's deed; and a vendee of the purchaser should exhibit both such deed and that from the purchaser to him, if he intends to apply for a writ of assistance against such party.

possession.³⁷ The authority of the court to issue a process and to place the purchaser in possession, is placed upon the ground that it has power to enforce its own decrees and thus to avoid the circuitry of vexatious litigation.³⁸

But where a party in possession was not a party to the foreclosure, and did not acquire his possession from a person who was bound by the decree, but who is a mere stranger and who entered into possession before the suit was begun, the court will have no power either under the statute or independently of it to deprive him of possession by enforcing the decree.³⁹ A person obtaining possession by a legal proceeding under a claim of right, will not be summarily dispossessed by an enforcement of the decree of foreclosure adverse to a party to the suit, the proceedings having been commenced prior to the filing of the bill of foreclosure, and he not being a party to the foreclosure.⁴⁰

And a tenant in possession, who became such after the commencement of the suit, where he holds under a person not a party to the suit, who was lawfully in possession under a claim hostile to that derived under the mortgage, will not be dispossessed, although made a party to the suit for the purpose of barring an interest held by his wife in other premises covered by the mortgage, of which he was in possession and which he had delivered up in pursuance of the decree.⁴¹ But

³⁷ *Ludlow v. Lansing*, Hopk. Ch. (N. Y.) 231; *Kershaw v. Thompson*, 4 Johns. Ch. (N. Y.) 609. See *VanHook v. Throckmorton*, 8 Paige Ch. (N. Y.) 33; *Frelinghuysen v. Colden*, 4 Paige Ch. (N. Y.) 204; *Suffern v. Johnson*, 1 Paige Ch. (N. Y.) 450, 19 Am. Dec. 440; *McGown v. Wilkins*, 1 Paige Ch. (N. Y.) 120; *Creighton v. Paine*, 2 Ala. 158; *Bright v. Pennywhit*, 21 Ark. 130; *Horn v. Volcano Water Works*, 18 Cal. 141; *Skinner v. Beatty*, 16 Cal. 156; *Trabuc v. Ingles*, 6 B. Mon. (Ky.) 82; *Schenck v. Con-*

over, 13 N. J. Eq. (2 Beas.) 220, 78 Am. Dec. 95.

³⁸ *Ludlow v. Lansing*, Hopk. Ch. 231; *Jones v. Hooper*, 50 Miss. 514.

³⁹ *Meiggs v. Willis*, 8 N. Y. Civ. Proc. 125; *Boynton v. Jackway*, 10 Paige Ch. (N. Y.) 307; *VanHook v. Throckmorton*, 8 Paige Ch. (N. Y.) 33; *Frelinghuysen v. Colden*, 4 Paige Ch. (N. Y.) 204; *Kessinger v. Whittaker*, 82 Ill. 22; *Benhard v. Darrow*, Walk. Ch. (Mich.) 519.

⁴⁰ *Frelinghuysen v. Colden*, 4 Paige Ch. (N. Y.) 204.

⁴¹ *New York Life Ins. & Trust*

where a person comes into possession *pendente lite* through a party to the suit, he will be bound by the decree in the same manner as the party whom he succeeds.⁴²

§ 724. Provisions of Code for obtaining possession.—It is provided by the New York Code of Civil Procedure,⁴³ that where a judgment in an action relating to real property, allots to any person a distinct parcel of land, or contains a direction for the sale of real property, or confirms such an allotment or sale, it may also, except in a case where it is expressly prescribed that the judgment may be enforced by execution, direct the delivery of the possession of the property to the person entitled thereto. If a party or his representative, or successor, who is bound by the judgment, withholds possession from a person thus declared to be entitled thereto, the court, besides punishing the disobedience as a contempt, may, in its discretion, by order, require the sheriff to put that person into possession. Such an order must be executed, as if it were an execution for the delivery of the possession of the property.

§ 725. Writ of assistance—When granted.—It was held in the recent case of *Dyer v. Kopper*,⁴⁴ that the execution of a decree of foreclosure giving possession, can be made by a summary process. A writ of assistance is an appropriate process to issue from a court of equity, to place a purchaser of mortgaged premises in possession under its decree of sale, after he has received the deed of the officer making the sale, as against parties who are bound by the decree, and who refuse to surrender possession pursuant to the directions of the court.⁴⁵

Co. v. Cutler, 9 How. (N. Y.) Pr. 407.

⁴² *Kessinger v. Whittaker*, 82 Ill. 22.

⁴³ § 1675.

⁴⁴ 59 Vt. 477, 489, 59 Am. Rep.

742, 9 Atl. 4. See *Ludlow v. Lansing*, Hopk. Ch. (N. Y.) 231.

⁴⁵ *Kershaw v. Thompson*, 4 Johns. Ch. (N. Y.) 609; *Terrell v. Allison*, 88 U. S. (21 Wall.) 291, 22 L. ed. 635; *Watkins v. Jerman*, 36 Kan.

After a purchaser has complied with the terms of the sale,⁴⁶ and has obtained his deed from the officer making the sale,⁴⁷ if the possession is wrongfully withheld from him in disobedience of the decree of the court, he will be entitled to a writ of assistance, on proof that he has exhibited his deed to the person in possession and demanded the possession of the premises.⁴⁸ Some of the cases hold that a notice of the application for a writ of assistance should first be given to the defendant and also to the tenant of the premises, if there is one.⁴⁹ But it would seem, according to the current of authorities, that a notice of the application is unnecessary.⁵⁰ Mere delay in applying for a writ is not sufficient to warrant denying the use of the remedy.⁵¹ And it will be granted even after the time for redemption has expired.⁵²

But a writ of assistance can only issue against parties to the suit, or persons coming into possession under the defend-

464, 13 Pac. 798; *Hilbernia Savings & Loan Soc. v. Lewis*, 117 Cal. 577, 47 Pac. 602, 49 Pac. 714; *Margruder v. Kittle as adm'x, etc.* 2 Neb. (Unof.) 418, 89 N. W. 272; *Harding v. Harker*, 17 Idaho, 341, 134 Am. St. Rep. 259, 105 Pac. 788. See *Emerick v. Miller*, 159 Ind. 317, 64 N. E. 28.

⁴⁶ *Battershall v. Davis*, 23 How. (N. Y.) Pr. 383; *Armstrong v. Humphries*, 5 S. C. 128.

⁴⁷ *Bennett v. Matson*, 41 Ill. 332. See *Howard v. Bond*, 42 Mich. 131.

⁴⁸ *Kershaw v. Thompson*, 4 Johns. Ch. (N. Y.) 609; *VanHook v. Throckmorton*, 8 Paige Ch. (N. Y.) 33; *Frelinghuysen v. Colden*, 4 Paige Ch. (N. Y.) 204; *Montgomery v. Tutt*, 11 Cal. 190; *O'Brian v. Fry*, 82 Ill. 87; *Kessinger v. Whittaker*, 82 Ill. 22; *Oglesby v. Pearce*, 68 Ill. 220; *Aldrich v. Sharp*, 4 Ill. (3 Scam.) 261; *Wat-*

kins v. Jerman, 36 Kan. 464; *Wahler v. Endter*, 46 Wis. 301.

⁴⁹ *Devaucene v. Devaucene*, 1 Edw. Ch. (N. Y.) 272; *Ray v. Trice as rec'r etc.* 49 Fla. 375, 38 So. 367; *Higgins v. Peterson*, 64 Ill. App. 256. See *post*, § 726.

In Wisconsin it is left to the discretion of the court. *Prahl v. Rogers*, 127 Wis. 353, 106 N. W. 287.

⁵⁰ *Valentine v. Teller*, Hopk. Ch. (N. Y.) 422; *Lynde v. O'Donnell*, 21 How. (N. Y.) Pr. 39, 12 Abb. (N. Y.) Pr. 291; *New York Life Ins. & Trust Co. v. Rand*, 8 How. (N. Y.) Pr. 35, 352; *Kershaw v. Thompson*, 4 Johns. Ch. (N. Y.) 609; *Dove v. Dove*, 1 Bro. Ch. 376, 2 Dick. 617; *Huguenin v. Baseley*, 15 Ves. 180.

⁵¹ *Prahl v. Rogers*, 127 Wis. 353, 106 N. W. 287.

⁵² *Taylor v. Ellenberger*, 134 Cal. 31, 66 Pac. 4.

ant after its commencement,⁵³ The supreme court of Illinois, in the case of *Cochran v. Folger*,⁵⁴ say that a decision by a justice, in forcible detainer, in favor of the mortgagor, after a decree of sale, but without demand for possession or production of the master's deed, is not a bar to a writ of assistance to the purchaser on foreclosure.

§ 726. Writ of assistance—How obtained.—Where the original decree of foreclosure does not contain an order for the surrender of the premises to the purchaser, a writ of assistance cannot be granted until such an order for the possession of the premises has been obtained upon notice to the party occupying the property after a demand for the possession.⁵⁵ A proceeding by a purchaser at a foreclosure sale to obtain a writ of assistance by motion, is not the institution of a new suit, but is only a supplementary step in the action for foreclosure.⁵⁶ Recourse to an action at law to obtain possession will not, however, be precluded thereby;⁵⁷ both remedies may be pursued at the same time without mutual interference, until possession is obtained.⁵⁸

A purchaser under a decree of foreclosure will not be entitled to a writ of assistance to turn the occupant of the premises out of possession, even though such person went into possession *pendente lite*, unless he did so under and by permission of some party to the action,⁵⁹ for a writ of assistance will be proper only where a party who is bound by the

⁵³ *Pidcock v. Melick* (N. J. Ch.)

4 Atl. 98.

⁵⁴ 116 Ill. 194, 5 N. E. 383.

⁵⁵ *Lynde v. O'Donnell*, 12 Abb. (N. Y.) Pr. 286, 21 How. (N. Y.) Pr. 34; *N. Y. Life Ins. & Trust Co. v. Rand*, 8 How. (N. Y.) Pr. 35, 352. See *Kessinger v. Whittaker*, 82 Ill. 22; *Ballinger v. Waller*, 9 B. Mon. (Ky.) 67; *Benhard v. Darrow*, Walk. Ch. (Mich.) 519.

⁵⁶ *Kessinger v. Whittaker*, 82 Ill. 22.

⁵⁷ *Dickey v. Gibson*, 121 Cal. 276, 53 Pac. 704.

⁵⁸ *Kessinger v. Whittaker*, 82 Ill. 22; *Haynes v. Meek*, 14 Iowa, 320.

⁵⁹ *Boynton v. Jackway*, 10 Paige Ch. (N. Y.) 307; *VanHook v. Throckmorton*, 8 Paige Ch. (N. Y.) 33. See *Ludlow v. Lansing*,

decree of foreclosure, refuses to give up possession on request; and it should not be granted without proper proof of such refusal, after the right of possession has been established.⁶⁰

Where a tenant is in possession, the deed executed by the officer making the sale should be exhibited to him by the purchaser, when he makes a demand for possession, and in case of his refusal to give possession, no notice of the application to the court for a writ of assistance need be given.⁶¹ If a person in possession is not a party to the suit, but has come into possession of the mortgaged premises since the action was commenced, a writ of assistance will not be granted on refusal to deliver possession to the purchaser on production of the referee's deed, unless notice of the application for such a writ has been served upon him.⁶² But as against a person who was a party to the suit, a writ of assistance may issue *ex parte*.⁶³ It seems, however, that one who has come into possession *pendente lite* will be entitled to a notice of the motion.⁶⁴

In all cases of resistance by the occupants, the proper method of putting the purchaser into possession is by means of a writ of assistance; it may be issued upon proof of the service of the order to deliver possession and of a refusal to comply with such order.⁶⁵

Hopk. Ch. (N. Y.) 231; *Thompson v. Campbell*, 57 Ala. 189; *McChord v. McClintock*, 5 Litt. (Ky.) 304.

⁶⁰ *Howard v. Bond*, 42 Mich. 131.

⁶¹ *N. Y. Life Ins. & Trust Co. v. Rand*, 8 How. (N. Y.) Pr. 35, 352. But see *Fackler v. Worth*, 13 N. J. Eq. (2 Beas.) 395.

⁶² *Benhard v. Darrow*, Walk. Ch. (Mich.) 519.

⁶³ *N. Y. Life Ins. & Trust Co. v. Cutler*, 9 How. (N. Y.) Pr. 407, N. Y. Life Ins. & Trust Co. v. *Rand*, 8 How. (N. Y.) Pr. 35, 352.

⁶⁴ *Benhard v. Darrow*, Walk. Ch. (Mich.) 519; *Commonwealth v. Ragsdale*, 2 Hen. & Mun. (Va.) 8. But see *Lynde v. O'Donnell*, 12 Abb. (N. Y.) Pr. 286, 21 How. (N. Y.) Pr. 34.

⁶⁵ *Valentine v. Teller*, Hopk. Ch. 422; *Ballinger v. Waller*, 9 B. Mon. (Ky.) 67; *Hart v. Lindsay*, Walk. Ch. (Mich.) 144; *Schenck v. Conover*, 13 N. J. Eq. (2 Beas.) 220, 78 Am. Dec. 95.

§ 727. Against whom possession delivered.—Under a decree of foreclosure of mortgaged premises the court will award a writ of assistance and give possession to the purchaser, as against all persons who were parties to the suit or who came into possession under any of them while the suit was pending.⁶⁶ But the court will not undertake to remove persons who went into possession after the purchaser had received his deed and conveyed the premises to another.⁶⁷ A person who enters into possession fifteen months after the sale cannot be regarded as having entered pending the suit.⁶⁸

Possession may be given to a purchaser as against a person who was not a party to the suit, if he took possession after the commencement of the action in collusion with the mortgagor, though under a claim of tax title;⁶⁹ but the court will not grant a writ of assistance as against a person who entered pending the suit under an adverse claim of title and without the consent or collusion of the mortgagor.⁷⁰ And a party who enters pending the suit will not be turned out of possession under the decree of foreclosure, if he did not enter under a party to the suit or under some one who derived title to the premises from, or had gone into possession with the permission of, a party to the action.⁷¹

The ordinary rule in regard to the execution of a writ of assistance for possession is, that the purchaser must be put in full and complete possession; that the possession to be given by a sheriff is a full and actual possession; and that where the purchaser is put into possession under circum-

⁶⁶ *Bell v. Birdsall*, 19 How. (N. Y.) Pr. 491, *sub nom. Betts v. Birdsall*, 11 Abb. (N. Y.) Pr. 222; *Kessinger v. Whitaker*, 82 Ill. 22; *Strong v. Smith*, 68 N. J. Eq. 686, 63 Atl. 493. See *Finger v. McCaughey, as adm'r etc.* 119 Cal. 59, 51 Pac. 13.

⁶⁷ *Bell v. Birdsall*, 19 How. (N. Y.) Pr. 491, *sub nom. Betts v. Birdsall*, 11 Abb. (N. Y.) Pr. 222.

⁶⁸ *Bell v. Birdsall*, 19 How. (N. Y.) Pr. 491, *sub nom. Betts v. Birdsall*, 11 Abb. (N. Y.) Pr. 222.

⁶⁹ *Brown v. Marzyck*, 19 Fla. 840.

⁷⁰ *VanHook v. Throckmorton*, 8 Paige Ch. (N. Y.) 33.

⁷¹ *VanHook v. Throckmorton*, 8 Paige Ch. (N. Y.) 33; *Frelinghuysen v. Colden*, 4 Paige Ch. (N. Y.) 204.

stances plainly indicating that such possession will be but momentary, and he is accordingly ousted the same day, such execution of the writ will be insufficient; the writ of possession will not be regarded as properly executed until the sheriff and his officers have gone and the purchaser is left in quiet and settled possession.⁷²

§ 728. Who entitled to writ of assistance.—The purchaser at a sale made under a mortgage foreclosure is, of course, entitled to a writ of assistance; and it has been held that the assignee or grantee of the purchaser is entitled to the same remedy,⁷³ on the further proof that the deed from the purchaser to him has also been exhibited to the party in possession.⁷⁴

§ 729. Writ of assistance improperly granted.—Where a writ of assistance which was improperly granted, has been executed, or having been properly granted, persons not properly within the meaning of its terms, have been aggrieved by having it executed against them, the court, upon motion, will be bound to correct the wrong; and the persons dispossessed under such writ are entitled to have the possession restored to them.⁷⁵

Where a writ of assistance in favor of a purchaser at a mortgage foreclosure sale is issued upon notice against a tenant in possession of the mortgaged premises, and is executed by placing the purchaser in possession thereof, it will be conclusive upon the tenant and the purchaser as to the right of possession. If the tenant had any defence against the writ, such defence should have been presented upon the hearing of the motion for the writ; the question whether the

⁷² *Newell v. Whigham*, 102 N. Y. 20, 1 N. Y. St. Rep. 666, reversing 99 Hun (N. Y.) 204.

⁷³ *Emerick v. Miller*, 159 Ind. 317, 64 N. E. 28.

⁷⁴ *N. Y. Life Ins. & Trust Co. v. Rand*, 8 How. (N. Y.) Pr. 35.

⁷⁵ *Meiggs v. Willis*, 8 N. Y. Civ. Proc. Rep. 125; *Chamberlain v. Chloes*, 35 N. Y. 477.

writ was properly awarded cannot be reviewed in another action in another court.⁷⁶

§ 730. **Writ against tenants in possession.**—It has been said that the foreclosure of a mortgage and a sale thereunder of the demised premises pursuant to a decree, extinguishes the title of the mortgagor and also the rights of his lessee.⁷⁷ But where tenants in possession of the mortgaged premises have not been made parties to the suit, the purchaser will not be entitled to possession as against them;⁷⁸ but if they are made parties, they will be bound to attorn to the purchaser or be removed by a writ of assistance, notwithstanding the fact that they claim under an unexpired lease executed by the mortgagor for a term of years prior to the date of the mortgage foreclosed.⁷⁹

§ 731. **Writ of assistance not granted against holder of paramount title.**—Where, on application for a writ of assistance by a purchaser at a sale under a decree of foreclosure, the party in possession claims to hold the premises under a lease executed before the execution of the mortgage under which the sale is made, the court will not grant a writ of assistance at the instance of such purchaser.⁸⁰ In all cases where the person in possession shows a right paramount to the mortgage, the court will not attempt to decide any questions of legal title, and the purchaser will be obliged to seek possession by proceedings at law.⁸¹

⁷⁶ *Rawiszer v. Hamilton*, 51 How. (N. Y.) Pr. 297.

⁷⁷ *Smith v. Cooley*, 5 Daly (N. Y.) 401, 409; *Simers v. Saltus*, 3 Den. (N. Y.) 216; *Kershaw v. Thompson*, 4 Johns. Ch. (N. Y.) 609.

⁷⁸ *Davidson v. Weed*, 21 App. Div. 579, 48 N. Y. Supp. 368. See also *New Jersey Building, Loan & Investment Co. v. Schatzkin*, 72 N.

J. Eq. 175, 64 Atl. 1086. But see *Reily v. Carter*, 75 Miss. 798, 65 Am. St. Rep. 621, 23 So. 435.

⁷⁹ *Lovett v. German Reform Church*, 9 How. (N. Y.) Pr. 220.

⁸⁰ *Thomas v. DeBaum*, 14 N. J. Eq. (1 McCart.) 37.

⁸¹ *Fay v. Stubenrauch*, 83 Pac. 82. (Cal. App.); *Board of Home Missions of Presbyterian Church v Davis*, 70 N. J. Eq. 577, 62 Atl. 447;

Where a purchaser enters into an arrangement with the mortgagor subsequently to the sale, whereby the mortgagor remains in possession, he will be deemed in possession under such contract, and not as a defendant to the foreclosure suit, and the purchaser will not be entitled to a writ of assistance to put himself in possession of the premises; he will then be left to his remedy by an action at law for ejectment or otherwise.⁸² It is held that the granting of a writ of assistance to put a purchaser into possession of the premises rests in every case in the sound discretion of the court; and that in all cases of doubtful right, the possession will be left to legal adjudication.⁸³

§ 732. Summary proceedings under the New York Code.—By a provision of the New York Code of Civil Procedure,⁸⁴ the remedy by summary proceedings to obtain possession of premises in mortgage foreclosures, is restricted to those cases where the foreclosure is conducted by advertisement and not by an equitable action.⁸⁵

Ex parte Jenkins, 48 S. C. 325, 26 S. E. 686; *Schenck v. Conover*, 13 N. J. Eq. (2 Beas.) 220, 78 Am. Dec. 95. See *McComb v. Kankey*, 1 Bland. Ch. (Md.) 363, note C.; *State ex rel. Biddle v. Superior Court of King County*, 63 Wash. 312, 115 Pac. 307; *Ricketts v. Chicago Permanent Building & Loan Asso.* 67 Ill. App. 71.

⁸² *Toll v. Hiller*, 11 Paige Ch. (N. Y.) 228.

⁸³ *McComb v. Kankey*, 1 Bland. Ch. (Md.) 363, note C. See *Thomas v. DeBaum*, 14 N. J. Eq. (1 McCart.) 37.

⁸⁴ § 2232.

⁸⁵ *Green v. Geiger*, 46 App. Div. 210, 61 N. Y. Supp. 524. See *post*, § 962.

CHAPTER XXIX.

JUDGMENT FOR DEFICIENCY.

REPORTING DEFICIENCY—WHO LIABLE FOR—LIABILITY ON BOND—GUARANTY AND ASSUMPTION—INTENTION OF PARTIES GOVERNS—HOW AMOUNT OF DETERMINED—EXECUTION FOR—MISCELLANEOUS MATTERS.

- § 733. Generally.
- § 734. Referee conducting sale reporting deficiency.
- § 735. Contingent decree for deficiency.
- § 736. Suit at law for deficiency.
- § 737. Power of court of chancery to decree judgment for deficiency.
- § 738. Judgment for deficiency against mortgagor.
- § 739. Same—Service of process by publication.
- § 740. Same—Death of mortgagor.
- § 741. Judgment for deficiency against third persons.
- § 742. Deficiency against assignor guaranteeing payment.
- § 743. Deficiency against party assuming mortgage.
- § 744. Mortgaged premises primary fund—Subsequent liability.
- § 745. Assumption of mortgage—Defense by grantee.
- § 746. Assumption of mortgage—When grantee not liable for deficiency.
- § 747. Release from liability on assumption.
- § 748. No liability where deed subject to mortgage.
- § 749. Oral contract of assumption may be enforced.
- § 750. Intention of parties determines question of assumption.
- § 751. No judgment for deficiency against non-resident.
- § 752. No judgment for deficiency for installments not yet due.
- § 753. Deficiency—How determined.
- § 754. When judgment for deficiency may be docketed.
- § 755. When judgment for deficiency becomes a lien.
- § 756. Execution for deficiency.
- § 757. Miscellaneous matters connected with judgments for deficiency.

§ 733. Generally.—All proceedings to collect any deficiency arising on the sale of mortgaged premises under a foreclosure are purely statutory.⁸⁶ The statute, authorizing

⁸⁶ *McCrickett v. Wilson*, 50 Mich. petition to set such proceedings
513. In this case it was held that a aside for want of notice was per-

a judgment of deficiency in an action for foreclosure in New York, was enacted to avoid the necessity of a separate action at law, and to enable one court to dispose of the whole case.⁸⁷ In most of the states, statutes have been enacted for the regulation of mortgage foreclosures, giving power to the court, not only to direct the sale of the mortgaged premises and to compel the delivery of the possession thereof to the purchaser, but also to adjudge payment by the mortgagor or by any other person liable for the debt of any deficiency that might remain unsatisfied after the sale of the mortgaged premises, and, as in other actions, to issue the necessary execution upon such judgment of deficiency.⁸⁸

Without statutory authority such an execution could not be issued in a foreclosure against the property of the mortgagor or other person liable for the deficiency remaining unsatisfied after the application of the proceeds of the sale to the payment of the mortgage debt.⁸⁹ An action at law was formerly the only remedy for the recovery of such deficiency.

In all those cases where there is an express agreement for the payment of money, and the mortgaged premises fail to sell for enough to pay the debt and costs and expenses of suit, the court will direct that the unsatisfied balance be levied on other property of the mortgage debtor.⁹⁰ But a judgment for

missible without filing a bill of review. *Wisconsin National Loan & Building Ass'c. v. Pride*, 136 Wis. 102, 116 N. W. 637.

⁸⁷ *Scofield v. Doscher*, 72 N. Y. 491; *Equitable Life Ins. Co. v. Stevens*, 63 N. Y. 341; *Thorne v. Newby*, 59 How. (N. Y.) Pr. 120.

⁸⁸ N. Y. Code Civ. Proc. § 1627; Florida Code (Bush's Dig.) 849; North Carolina Code, § 190; Wisconsin Rev. Stat. § 3156. See *Equitable Life Ins. Co. v. Stevens*, 63 N. Y. 341; *Thorne v. Newby*, 59 How. (N. Y.) Pr. 120; *Jarman v. Wiswall*, 24 N. J. Eq. (9 C. E. Gr.)

267. See Hurd's Stat. 1909, chap. 95, § 16 (Ill.) *Strause v. Dutch*, 250 Ill. 326, 35 L.R.A.(N.S.) 413, 95 N. E. 286. See *ante*, § 216, *et seq.*

⁸⁹ *Stark v. Mercer*, 4 Miss. (3 How.) 377; *Fleming v. Sitton*, 1 Dev. & B. (N. C.) Eq. 621; *Waddell v. Hewitt*, 2 Ired. (N. C.) Eq. 252; *Orchard v. Hughes*, 68 U. S. (1 Wall.) 73, 17 L. ed. 560. But see *Wightman v. Gray*, 10 Rich. (S. C.) Eq. 518. See *ante*, §§ 216-220.

⁹⁰ *Thomas v. Simmons*, 103 Ind. 419, 2 N. E. 203, 3 Id. 381, Ind. Code 1852, § 634, 2 Ind. Rev. Stat.

a deficiency entered where no indebtedness actually exists, cannot be used for purposes of redemption.⁹¹

It is said that under the Mississippi code,⁹² providing that, upon the confirmation of the report of sale of property under a decree to satisfy a mortgage or other lien, the court shall render a decree for any balance, such decree may be had against the personal representative of the deceased mortgagor.⁹³

The proceedings to collect a deficiency left after applying the proceeds of the sale of mortgaged lands on foreclosure sale to the discharge of the mortgage debt, are purely statutory, and the statute in each particular instance governs. It has been said that a further or other judgment for deficiency is not necessary in a mortgage foreclosure, where the decree of foreclosure directs a sale and judgment for deficiency; nor is an order confirming the sale necessary as to those persons against whom the judgment for deficiency is directed.⁹⁴ But a foreclosure decree in the alternative that the defendants pay the debt within thirty days, or upon their failure the land shall be sold, does not create a personal liability.⁹⁵

It is held error to include in a personal decree against a mortgagor on the notes secured by the mortgage in a foreclosure suit brought by the mortgagee's executor, an item of interest against which limitation had run before the mortgagee's death.⁹⁶ But the fact that the mortgagee in an action to foreclose his mortgage procured an amount to be found due in excess of the sum actually due, does not preclude the recovery of a deficiency judgment by him for the amount actually due, where in the proceedings for such deficiency judg-

1876, p. 262, Rev. Stat. 1881, § 1097.

⁹¹ *Wetherbee v. Fitch*, 117 Ill. 67, 7 N. E. 513.

⁹² Miss. Code, § 1935.

⁹³ *Weir v. Field*, 67 Miss. 292, 7 So. 355.

⁹⁴ *Taylor v. Derrick*, 46 N. Y. S. R. 583, 19 N. Y. Supp. 785.

⁹⁵ *Dates v. Winstanley*, 53 Ill. App. 623.

⁹⁶ *McIntire v. Conrad*, 93 Mich. 526, 53 N. W. 829.

ment the amount found due in the decree is mutually disregarded and a new accounting had.⁹⁷

A personal judgment for deficiency may be rendered not only for the amount of interest and principal remaining unpaid, but also for insurance moneys, under a provision of the mortgage that the premises shall be kept insured, and, in case of default made by the mortgagor, the same shall be performed by the mortgagee, and all expenses incurred in so doing shall be paid by the mortgagor.⁹⁸

The judgment for deficiency and the proceedings to collect it being purely statutory, the judgment can be granted only in those cases where authorized. There can be no judgment for deficiency granted against the maker of a promissory note secured by a valid deed of trust before the security has been legally exhausted by foreclosure.⁹⁹ Neither can a judgment for deficiency be had upon a mortgage foreclosed for default in payment of interest, in those cases where the principal is not due, and there is no provision in the mortgage that it shall become due upon default in payment of installment of interest.¹

In Connecticut the statute² bars further action on a mortgage debt where there has been a foreclosure without making the mortgagee a party thereto.³ In New York it is held that no judgment for deficiency can be rendered under the code,⁴ providing for judgment for deficiency in a mortgage debt after sale of property and application of the proceeds, in an action to foreclose a mortgage, where a sale is rendered impossible by foreclosure and sale under a prior mortgage, although thereafter judgment for sale has been entered, and although a surplus is left upon such sale, after the application of

⁹⁷ *Grand Island Sav. & L. Asso. v. Moore*, 40 Neb. 686; 59 N. W. 115.

⁹⁸ *Building & L. Asso. v. Logan*, 66 Fed. 827.

⁹⁹ *Powell v. Pattison*, 100 Cal. 236, 34 Pac. 677.

¹ *Farmers' Loan & T. Co. v. Grape Creek Coal Co.* 13 C. C. A. 87, 65 Fed. 717. See *post*, § 752.

² Conn. Act. 1878.

³ *Curtis v. Hazen*, 56 Conn. 146, 14 Atl. 771.

⁴ N. Y. Code Civ. Proc. § 1627.

which a balance remains due upon the debt.⁵ And in South Carolina it is said, in the case of *Hartzog v. Goodwin*,⁶ that a mortgagee who fails in a foreclosure because payments made are held to extinguish the mortgage debt, instead of another due him from the mortgagor to which he had sought to apply them, cannot in the foreclosure suit have personal judgment against the mortgagor for the balance due upon the latter debt.

§ 734. Referee conducting sale reporting deficiency.—

The referee conducting the sale in a mortgage foreclosure, is usually required to report any deficiency remaining unpaid after the sale of the property and the application of the proceeds thereof to the payment of the debt. The referee should ascertain the amount of the deficiency, and also the names of the parties who are liable for its payment, and state these facts in his report to the court; a direction to the referee to report such facts should be included in the decree of sale.⁷

A referee's report of sale, which shows that the apparent deficiency is produced entirely by the unauthorized allowance of a claim to the purchaser, is to be treated as not reporting any deficiency.⁸

On the confirmation of the report of the officer making the sale, a judgment for deficiency may be docketed, when the judgment and decree of sale so provides.⁹ But it is said that such judgment cannot be entered, even contingently, until after the officer appointed to make the sale has made and filed his report,¹⁰ and, even then, the clerk should not enter up

⁵ *Frank v. Davis*, 61 Hun (N. Y.) 496, 41 N. Y. S. R. 292, 16 N. Y. Supp. 369.

⁶ 37 S. C. 603, 15 S. E. 880.

⁷ *McCarthy v. Graham*, 8 Paige Ch. (N. Y.) 480.

⁸ *Bache v. Doscher*, 67 N. Y. 429, aff'g 41 N. Y. Supr. Ct. (9 J. & S.) 150, See *ante*, § 225.

⁹ See *Bache v. Doscher*, 9 Jones & S. (N. Y.) 150; *Bank of Roch-*

ester v. Emerson, 10 Paige Ch. (N. Y.) 359; *Cartly v. Graham*, 8 Paige Ch. (N. Y.) 480.

¹⁰ *Hunt v. Dohrs*, 39 Cal. 304; *Culver v. Rogers*, 28 Cal. 520; *Englund v. Lewis*, 25 Cal. 337; *Cormeries v. Genella*, 22 Cal. 116; *Rowland v. Leiby*, 14 Cal. 156; *Lipperd v. Edwards*, 39 Ind. 165; *Cobb v. Thornton*, 8 How. (N. Y.) Pr. 66.

such judgment without the further order of the court.¹¹ Thus, it is said by the supreme court of South Carolina, in the case of *Lawton v. Perry*,¹² that no judgment exists for any deficiency of the mortgage debt after the proceeds of a sale under foreclosure of the mortgaged property have been applied thereto, until an order of the court is had on the report of the officer making the sale showing what deficiency exists, for a judgment for such deficiency, with leave to enforce its collection by execution. Consequently, a judgment of foreclosure is erroneous and void in providing for the recovery of any specific sum of money as a deficiency to be enforced by execution, before the mortgaged premises are sold and the proceeds of the sale found to be insufficient.¹³

The rule requiring application to the court for an order confirming the report of the officer appointed to make the sale, and to enter further judgment upon the filing of said report, before issuing execution in supplementary proceedings, is not uniformly applied in the courts. In New York it is held not to be essential;¹⁴ a failure to procure a confirmation before issuing such execution being a mere irregularity at most, and inasmuch as it is purely a question of procedure, the decision of the lower court is final.¹⁵ In Michigan, a special application is required to be made to the court before an execution can issue on a judgment for deficiency;¹⁶ and in Nebraska, a prior order of confirmation is essential,¹⁷ as is also the case in New Jersey¹⁸ and Wisconsin.¹⁹

¹¹ *Leviston v. Swan*, 33 Cal. 480. See *Hooper v. McDade*, 1 Cal. App. 733, 82 Pac. 1116.

¹² 40 S. C. 255, 18 S. E. 861.

¹³ *Parr v. Lindler*, 40 S. C. 193, 18 S. E. 636.

¹⁴ *Bicknell v. Byrnes*, 23 How. (N. Y.) Pr. 486; *Springsteene v. Gillett*, 30 Hun (N. Y.) 260; *Moore v. Shaw*, 15 Hun (N. Y.) 428, affd. 77 N. Y. 512; *Bache v. Doscher*, 9 Jones & S. (N. Y.) 150, affd. 67 N. Y. 429.

¹⁵ *Moore v. Shaw*, 77 N. Y. 512, affg. 15 Hun (N. Y.) 428; N. Y. Code Civ. Proc. § 721, subd. 12.

¹⁶ *McCrickett v. Wilson*, 50 Mich. 513, 15 N. W. 885; *Gies v. Green*, 42 Mich. 107, 2 N. W. 283.

¹⁷ *Clapp v. Maxwell*, 13 Neb. 542, 14 N. W. 653.

¹⁸ *White v. Zust*, 28 N. J. Eq. (1 Stew.) 107.

¹⁹ *Tormey v. Gerhart*, 41 Wis. 54, Wis. Laws, p. 243.

§ 735. **Contingent decree for deficiency.**—The plaintiff in an action to foreclose a mortgage cannot have a personal judgment against any of the defendants prior to the final decree of foreclosure and sale.²⁰ The correct practice is, to make a contingent judgment in the decree of foreclosure and sale for the payment of any deficiency which may appear upon the coming in and the confirmation of the report of sale, and that the plaintiff have execution therefor.²¹ An execution cannot be issued until the deficiency has been ascertained from the report of sale.²² Where the person adjudged in the decree to be liable for the deficiency, has not appeared in the case, it is the practice in New Jersey, after ascertaining the amount of such deficiency, to award execution therefor *ex parte*.²³

The deficiency for which a mortgagor is liable, is ascertained by deducting the proceeds of the sale from the amount due on the mortgage for principal and interest, together with the costs and all taxes and assessments.²⁴ In a case where the decree of sale directed that the mortgagor, or other party personally liable for the debt, should pay any deficiency arising on the sale, the property was struck off for enough to satisfy the mortgage, but the purchaser refused to complete the sale; an order requiring him to do so was obtained, but was not enforced; the plaintiff, without proceeding against him for contempt, procured an order for a resale, and upon the second sale there was a deficiency; it was held that the mortgagor, or

²⁰ *Cobb v. Thornton*, 8 How. (N. Y.) Pr. 66.

²¹ *Cobb v. Thornton*, 8 How. (N. Y.) Pr. 66; *McCarthy v. Graham*, 8 Paige Ch. (N. Y.) 480. See *Eggleston v. Morrison*, 185 Ill. 577, 57 N. E. 775. See *ante*, §§ 223–225.

²² *Bank of Rochester v. Emerson*, 10 Paige Ch. (N. Y.) 115; *Howe v. Lemon*, 37 Mich. 164.

²³ *White v. Zust*, 28 N. J. Eq. (1 Stew.) 107.

But in Michigan a deficiency judgment cannot be entered without notice to the mortgagor. *Pren-tis v. Richardson's Estate*, 118 Mich. 259, 76 N. W. 381.

²⁴ *Marshall v. Davies*, 78 N. Y. 414, reversing 16 Hun (N. Y.) 606. See also *Mitchell v. Bowne*, 63 How. (N. Y.) Pr. 1, 14 N. Y. Wk. Dig. 234. See *ante*, § 225.

other party liable for the debt, was personally liable for the deficiency arising on the resale.²⁵

The deficiency contemplated by the New York Code²⁶ has been held to be only the deficiency arising from an actual sale under a foreclosure of the mortgage, and not the deficiency caused to a second mortgagee by a sale under a prior mortgage; in the latter case the remedy would be by an action on the bond.²⁷

A personal judgment against the maker of a promissory note secured by a valid deed of trust, is improper before the security has been legally exhausted by foreclosure.²⁸ The court of appeals of Missouri, in the case of *Steckman v. Harber*,²⁹ say that a person who has purchased notes covered by a deed of trust from one who agreed that he would not collect the money when it became due without first giving those liable thereon notice, and who directs the foreclosure of such deed at a place 100 miles distant without notifying those liable, although he sees them almost daily and knows that they are able to pay the amount of the notes, will not be allowed a judgment for the amount of the notes, interest and costs, without making a deed to those liable thereon of the lands purchased by him at the sale under the deed of trust. It is said by the supreme court of New York, in the case of *Brewer v. Longnecker*,³⁰ that a provision in a decree foreclosing a mortgage for an installment of the whole sum secured, and directing a sale of the whole premises, and that in case of a deficiency in the proceeds to pay the installment the defendants personally liable for the debt pay such deficiency, is improperly amended by providing for the payment of a deficiency in the whole mortgage debt not due, where there is another provision that in case the proceeds of the sale shall be

²⁵ *Goodwin v. Simonson*, 74 N. Y. 133. But see *Walsh v. Robinson*, 135 Mich. 16, 97 N. W. 55, 99 N. W. 282.

²⁶ Code Civ. Proc. § 1627.

²⁷ *Loeb v. Willis*, 22 Hun (N. Y.) 508. See *Siewert v. Hamel*, 33

Hun. (N. Y.) 44, and note to § 738 *post*.

²⁸ *Powell v. Pattison*, 100 Cal. 236, 34 Pac. 677.

²⁹ 55 Mo. App. 71.

³⁰ 15 N. Y. Supp. 937, 40 N. Y. S. R. 614.

insufficient to pay the whole debt the plaintiff, as installments become due, may apply for judgment against such defendants.

§ 736. Suit at law for deficiency.—In those cases where there is an express agreement for the payment of money, and on the sale of the mortgaged premises the sum realized from the property is not sufficient to discharge the mortgage debt, the mortgagee or holder of the mortgage may maintain an action at law for the amount remaining after deducting from the face of the debt, with interest and costs, the amount for which the mortgaged property was sold;³¹ because in such a case the foreclosure merely extinguishes the debt to the extent of the money produced by the sale of the mortgaged premises and applicable to the obligation.³² The supreme court of California say, in the case of *Blumberg v. Birch*,³³ that a new action upon a note originally secured by a mortgage, for a deficiency upon foreclosure upon which no valid judgment can be obtained because service was made by publication, is not barred by the code of that State,³⁴ providing that there can be but one action for the recovery of any debt or the en-

³¹ *Porter v. Pillsbury*, 36 Me. 278; *Briggs v. Richmond*, 27 Mass. (10 Pick.) 391, 396, 20 Am. Dec. 526; *West v. Chamberlain*, 25 Mass. (8 Pick.) 336; *Amory v. Fairbanks*, 3 Mass. 562; *Andrews v. Scotton*, 2 Bland. Ch. (Md.) 269; *Lansing v. Goelet*, 9 Cow. (N. Y.) 346; *Globe Ins. Co. v. Lansing*, 5 Cow. (N. Y.) 380, 15 Am. Dec. 474; *Case v. Boughton*, 11 Wend. (N. Y.) 106, 109; *Morgan v. Plumb*, 9 Wend. (N. Y.) 287, 292; *Spencer v. Harford*, 4 Wend. (N. Y.) 384, 386; *Hughes v. Edwards*, 22 U. S. (9 Wheat.) 489, 6 L. ed. 14; *Hatch v. White*, 2 Gall. C. C. 154; *Omaly v. Swan*, 3 Mass. C. C. 474; *Tooke v.*

Hartley, 2 Bro. Ch. 125; *sub nom. Tooke v. —*, 2 Dick, 785; *Aylet v. Hill*, 2 Dick 551; *Dashwood v. Blythway*, 1 Eq. Cas. Abr. 317; *Perry v. Barker*, 13 Vesy. 198, 204, 9 Rev. 171; *Strause v. Dutch*, 250 Ill. 326, 35 L.R.A.(N.S.) 413, 95 N. E. 286. See also *Johns v. Wilson*, 6 Ariz. 125, 53 Pac. 583. But see *Matter of Marshall*, 53 App. Div. 136, 65 N. Y. Supp. 760.

³² *Globe Ins. Co. v. Lansing*, 5 Cow. (N. Y.) 380, 15 Am. Dec. 474; *Dunkley v. Van Buren*, 2 John. Ch. (N. Y.) 231.

³³ 99 Cal. 416, 37 Am. St. Rep. 67, 34 Pac. 102.

³⁴ Cal. Code Civ. Proc. § 726.

forcement of any right secured by mortgage upon either real or personal property. It is said by the supreme court of New York, in the case of *Schultz v. Mead*,³⁵ that leave to sue at law on a judgment for deficiency is not necessary, because the code³⁶ has reference to the original debt which the mortgage secures, and does not apply to a suit for the deficiency.

It is said, in the case of *Winters v. Hub Mining Company*,³⁷ that a mortgagee who obtains a mortgage of foreclosure cannot thereafter maintain a separate action for the deficiency remaining, against the person liable for the debt, under a statute providing that there can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real or personal property, which action must be in accordance with the provisions therein made for the sale of the property and judgment for the deficiency.³⁸

§ 737. Power of court of chancery to decree judgment for deficiency.— In the absence of statutory provisions giving it authority, a court of equity possesses no power to give a lien upon or to sequester any other property of the mortgagor as an additional security, until the property described in the mortgage has been exhausted;³⁹ for that reason, it cannot decree the payment of any deficiency remaining after the application of the proceeds of the sale of the mortgaged premises to the payment of the debt, unless the court of chancery would have had jurisdiction to enforce the debt without the mortgage.⁴⁰

³⁵ 8 N. Y. Supp. 663, 29 N. Y. S. R. 203.

³⁶ N. Y. Code Civ. Proc. § 1628.

But see *Robert v. Kidansky*, 111 App. Div. 475, 97 N. Y. Supp. 913; *Morrison v. Slater*, 128 App. Div. 467, 112 N. Y. Supp. 855; *Darmstadt v. Manson*, 144 App. Div. 249 128 N. Y. Supp. 992.

³⁷ 57 Fed. 287.

³⁸ Idaho Rev. Stat. 4520.

³⁹ *Clapp v. Maxwell*, 13 Neb. 542.

⁴⁰ *Webber v. Blanc*, 39 Fla. 224, 22 So. 655; *Rosenbaum v. Kershaw*, 40 Ill. App. 659. See *Dunkley v. VanBuren*, 3 Johns. Ch. (N. Y.) 330; *Hunt v. Lewin*, 4 Stew. & Port. (Ala.) 138; *Morgan v. Wilkins*, 6

Thus, where no note, bond, mortgage or other legal obligation, was given to secure the payment of the debt, or, if given, had been lost, a court of equity could, in some states, enforce its payment as an equitable claim against the mortgagor, by a personal judgment for the balance remaining unsatisfied after the sale of the premises.⁴¹

It is said, in the case of *Taffey v. Atcheson*,⁴² that a mortgage executed in New Jersey before the statute of 1880,⁴³ declaring that no decree for deficiency shall be made in a foreclosure suit, is subject thereto, because the act does not affect the mortgage, but merely the remedy thereon. The supreme court of Utah, in the case of *Brerton v. Mills*,⁴⁴ say that the power inherent in the general equity jurisdiction given to the Utah supreme and district courts by the Organic Act⁴⁵ to direct a personal judgment for the debt and proceedings to collect it, before ordering a sale of mortgaged premises conveyed by the mortgagor with full covenants of warranty, cannot be abridged by a territorial statute providing that the lands must first be sold.

The circuit courts of the United States under equity rule 92 have equitable jurisdiction in a foreclosure suit to award a personal judgment for a deficiency.⁴⁶

§ 738. Judgment for deficiency against mortgagor.—
On the foreclosure of a mortgage by the mortgagee, the

J. J. Marsh. (Ky.) 28; McGee v. Davie, 4 J. J. Marsh. (Ky.) 70; Downing v. Palmateer, 1 T. B. Mon. (Ky.) 64; Stark v. Mercer, 4 Miss. (3 How.) 377; Fleming v. Sitton, 1 Dev. & B. (N. C.) Eq. 621; Orchard v. Hughes, 68 U. S. (1 Wall.) 73, 17 L. ed. 560; Noonan v. Lee, 67 U. S. (2 Black) 499, 11 L. ed. 278. See ante, §§ 216-220.

⁴¹ *Crutchfield v. Coke, 6 J. J. Marsh. (Ky.) 89; Waddell v.*

Hewitt, 2 Ired. (N. C.) Eq. 252. See Block v. Allen, 99 Ga. 417, 27 S. E. 733.

⁴² 42 N. J. Eq. (15 Stew.) 182, 6 Atl. 885.

⁴³ N. J. Pamphlet Laws, 1880, p. 255.

⁴⁴ 7 Utah, 426, 27 Pac. 81.

⁴⁵ U. S. Rev. Stat. § 1868.

⁴⁶ *Grant v. Winona & Southwestern Ry. Co. 85 Minn. 422, 89 N. W. 60; Northwestern Mutual Life Ins.*

debtor is entitled to credit only for the net proceeds realized from the sale, after deducting the costs and expenses of the sale and all liens for taxes.⁴⁷ No proceedings can be had upon a judgment or decree to compel the payment of the deficiency until the report of the referee or other officer conducting the sale has been filed and duly confirmed, and the exact amount of such deficiency has been ascertained.⁴⁸

It seems that where the judgment in an action for foreclosure provides, "that if the proceeds of the sale be insufficient to pay the amount so reported to be due to the plaintiff, the said referee specify the amount of such deficiency in his report of sale, and that the defendant pay the same to the plaintiff," it is not necessary to apply to the court for an order confirming the report of the referee before issuing execution against the defendant for the amount of the deficiency, nor to enter any further judgment upon the filing of the said report.⁴⁹

In most, if not all, the states there are statutes authorizing the court to award a conditional judgment for any deficiency

Co. v. Keith, 77 Fed. 374; *Seattle L. S. & E. Ry. Co. v. Union Trust Co.* 79 Fed. 179.

⁴⁷ *Marshall v. Davies*, 78 N. Y. 414.

⁴⁸ *Bache v. Doscher*, 41 N. Y. Supr. Ct. (9 J. & S.) 150; *Bank of Rochester v. Emerson*, 10 Paige Ch. (N. Y.) 359; *Tormey v. Gerhart*, 41 Wis. 54; *Baird v. McConkey*, 20 Wis. 297. In *Siewert v. Hamel*, 33 Hun (N. Y.) 44, during the pendency of an action brought to foreclose a mortgage, a prior mortgage upon the same premises was foreclosed, and the premises were sold and purchased by the plaintiff. The surplus arising from such sale was applied by the plaintiff in reduction of the amount due upon his second mortgage. The usual judg-

ment of foreclosure was then entered, after the said sale under the prior mortgage, directing the referee to specify the amount of the deficiency in his report of the sale, and adjudging the defendant to pay the same to the plaintiff. Thereafter the plaintiff, without having the premises sold under his judgment, applied for leave to enter a judgment of deficiency for the amount remaining due upon his judgment after applying thereon the amount of surplus money received under the foreclosure of the prior mortgage. The application was held to have been properly made and granted. See *ante*, §§ 224, 225, 227, 735.

⁴⁹ *Moore v. Shaw*, 15 Hun (N. Y.) 428.

there may be found and reported to the court by the officer authorized to make the sale.⁵⁰ Under these statutes it has

⁵⁰ See *Goodlett v. St. Elmo Invest Co.* 94 Cal. 297, 29 Pac. 105; *Windham County Sav. Bank v. Himes*, 55 Conn. 433, 12 Atl. 517; *Shelden v. Erskine*, 78 Mich. 627, 44 N. W. 146; *Weir v. Field*, 67 Miss. 292, 7 So. 355; *Flentham v. Steward*, 45 Neb. 640, 63 N. W. 924; *Grand Island Sav. & L. Assoc. v. Moore*, 40 Neb. 686, 59 N. W. 115; *Frank v. Davis*, 135 N. Y. 275, 31 N. E. 1100, 48 N. Y. S. R. 86, 29 Abb. (N. Y.) N. C. 294, 22 Civ. Prac. 426, 20 Wash. L. R. 699, 17 L.R.A. 306; *Clark v. Simmons*, 55 Hun (N. Y.) 175, 8 N. Y. Supp. 74, 28 N. Y. S. R. 738; *Schultz v. Mead*, 8 N. Y. Supp. 663, 29 N. Y. S. R. 203; *Shumway v. Orchard*, 12 Wash. 104, 40 Pac. 634; *Shepherd v. Pepper*, 133 U. S. 626, 33 L. ed. 706, 10 Sup. Ct. 438.

The Connecticut Act of 1833, Rev. 1875, p. 358, § 2, providing that a mortgagee may recover the deficiency on foreclosure, is not repealed by Conn. Laws 1878, chap. 129, providing for an appraisal of the mortgaged property by appraisers, and that the mortgagee shall recover only the difference between the value of the property as fixed by the appraisal and the amount of his claim, except where the appraisal is made under a later statute. *Windham County Sav. Bank v. Himes*, 55 Conn. 433, 12 Atl. 517.

The court holds these provisions are not inconsistent, but alternative. Also that part of the latter Act providing that no suit for deficiency shall be brought against one not a party to the foreclosure suit repeals

so much of the former Act as allowed suit against those not parties. *Windham County Sav. Bank v. Himes*, 55 Conn. 433, 12 Atl. 517.

In Michigan, How. Mich. Stat. § 6702, giving the court power to decree payment of any balance of a mortgage debt remaining unsatisfied after the sale, does not contemplate the case where there are several complainants who hold the mortgage jointly, but have no joint rights to any of the debts secured, and no provision is made for separate personal decree of deficiency in favor of the separate complainants. *Shelden v. Erskine*, 78 Mich. 627, 44 N. W. 146.

In Mississippi the exercise of the power conferred by Miss. Code, § 1935, upon the confirmation of the report of sale of property under a decree to satisfy a mortgage or other lien, to render a decree for any balance, is not to be limited to the term at which the sale is confirmed, but a decree for the balance may be moved for at any time before the statute of limitation bars its execution. *Weir v. Field*, 67 Miss. 292, 7 So. 355.

In Nebraska the Code of Civil Procedure, § 847 (now repealed) expressly authorized the district court, on the coming in of the report of sale of mortgaged premises, to render a personal judgment and award execution for any deficiency remaining unpaid on the decree. *Flentham v. Steward*, 45 Neb. 640, 63 N. W. 924. See *Blumle v. Kramer*, 14 Okl. 366, 79 Pac. 215.

been held that a purchaser at a foreclosure sale under a first mortgage, being also owner of a second mortgage, may purchase at a subsequent sale thereunder subject to his rights acquired on the first sale, and enter judgment for the deficiency.⁵¹ And it is said the fact that the mortgagee made a profit upon his purchase of the mortgaged premises is not a defense to an action on a judgment of deficiency.⁵² It is thought that in a suit against an association of individuals sustaining to each other the relation of partners, to foreclose a mortgage made by it, the members at the time of the execution of the mortgage, who were made parties to the suit, are each liable to a personal judgment for the deficiency.⁵³

The New York court of appeals, in *Frank v. Davis*,⁵⁴ say that a judgment for a deficiency under a junior mortgage is not prevented by the impossibility of a sale of the land, which results from the fact that, pending appeal from the judgment of foreclosure, a sale of the land was made under a prior mortgage and surplus was left insufficient to pay

In Washington, under Code Procedure, § 628, providing that when there is an express agreement for the payment of money secured, contained in the mortgage or separate instrument, the decree of foreclosure shall direct that the balance due remaining unsatisfied after the sale shall be satisfied by any property of the mortgage debtor, a personal judgment may be rendered against the makers of a note secured by a mortgage upon real estate at the time of rendition of a decree of foreclosure, so as to make it a general lien upon all the property owned by the mortgagor at the time of the entry thereof or thereafter acquired, and a previous return of sale is not essential. Shumway v. Orchard, 12 Wash. 104, 40 Pac. 634.

Under U. S. Rev. Stat. § 808,

relating to the District of Columbia, a decree in personam is authorized against a debtor for the balance remaining due after the proceeds of the sale of lands covered by a mortgage or a deed of trust in the nature thereof have been applied to the satisfaction of the debt. Shepherd v. Pepper, 133 U. S. 626, 33 L. ed. 706, 10 Sup. Ct. 438.

⁵¹ *Clark v. Simmons*, 55 Hun (N. Y.) 175, 28 N. Y. S. R. 738, 8 N. Y. Supp. 74.

⁵² *Schultz v. Mead*, 8 N. Y. Supp. 663, 29 N. Y. S. R. 203.

⁵³ *Goodlett v. St. Elmo Invest. Co.* 94 Cal. 297, 29 Pac. 505.

⁵⁴ 135 N. Y. 275, 31 N. E. 1100, 48 N. Y. S. R. 86, 29 Abb. (N. Y.) N. C. 294, 22 Civ. Proc. Rep. 426, 20 Wash. L. Rep. 699, 17 L.R.A. 306.

the junior mortgage, although the statute provides for a personal judgment for the residue of the debt, which is unsatisfied "after a sale of the mortgaged property." And it is held by the supreme court of Nebraska,⁵⁵ that a loan association holding stock of a mortgagor as additional security for the mortgage debt, is not obliged to resort to the security furnished by such stock before recovering a judgment for deficiency against the mortgagor. The supreme court of New York, in the case of *Hulbert v. Clark*,⁵⁶ say that an action for the foreclosure of a mortgage of real estate given to secure a simple-contract debt evidenced by promissory notes, being an action on the mortgage, and not on the notes, is solely an action *in rem* and no personal judgment for a deficiency can be had therein. And it is said that a mortgage corporation cannot recover against the mortgagor in an action on the note, where it purchased the property for value from the mortgagor's grantee, causing the conveyance to be made to its president to prevent the merging of the mortgage in the legal title, and, on default of payment of the mortgage debt, foreclosed and bid in the property.⁵⁷ The supreme court of Pennsylvania, in the case of *Cock v. Bailey*,⁵⁸ say that the holders of bonds of a limited partnership, secured by a mortgage upon its realty, who purchased the mortgaged premises through a trustee designated by them, subject to the mortgage lien, cannot afterwards collect the amount of the bonds from the company or its members individually, since the bonds become a part of the purchase money withheld at the time of the sale. And it is thought a failure to carry out an agreement of a mortgagee to bid the full amount of his judgment on foreclosure sale, in consideration of being permitted to take a default, constitutes an actionable fraud or wrong which en-

⁵⁵ *Grand Island Sav. & L. Asso. v. Moore*, 40 Neb. 686, 59 N. W. 115.

⁵⁶ 57 Hun (N. Y.) 558, 19 Civ. Proc. Rep. 177, 11 N. Y. Supp. 417, 33 N. Y. S. R. 354.

⁵⁷ *National Invest. Co. v. Nordin*, 50 Minn. 336, 52 N. W. 899.

⁵⁸ 146 Pa. St. 328, 23 Atl. 370, 29 W. N. C. 233, 22 Pitts. L. J. N. S. 217, 1 Pa. Adv. R. 19.

titles the mortgagors to relief against a personal judgment for a deficiency.⁵⁹

§ 739. Same—Service of process by publication.—In those cases where process in a mortgage foreclosure is served by publication only, no valid personal judgment can be entered for deficiency.⁶⁰ Yet it is said that a deficiency properly ascertained in a foreclosure suit commenced by publication of the summons, constitutes a subsisting indebtedness from the mortgagor so served, although no judgment can be entered therefor.⁶¹

§ 740. Same—Death of mortgagor.—We have already seen⁶² that the lien of a mortgage is not affected by the death of the mortgagor,⁶³ but the mortgagee or party holding the mortgage may proceed to foreclose the same. On such foreclosure the estate of the mortgagor is liable for any deficiency.⁶⁴ This is equally true where the mortgage is foreclosed by the executor, under leave of court, for the payment of debts;⁶⁵ but no judgment for deficiency in a suit to foreclose the same can be rendered against the heirs or personal representatives,⁶⁶ for the heirs, administrators and widow of the

⁵⁹ *Heim v Butin*, 109 Cal. 500, 50 Am. St. Rep. 54, 40 Pac. 39, 42 Pac. 138.

⁶⁰ *Blumberg v. Birch*, 99 Cal. 416, 37 Am. St. Rep. 67, 34 Pac. 102.

⁶¹ *Blumberg v. Berch*, 99 Cal. 416, 37 Am. St. Rep. 67, 34 Pac. 102.

⁶² See *ante*, § 280.

⁶³ A power of sale in a mortgage is revoked by the death of the mortgagor in Georgia, and perhaps elsewhere. *Wilkins v. McGehee*, 86 Ga. 764, 13 S. E. 84. See *ante*, § 324.

⁶⁴ See *Pillow v. Santelle*, 49 Ark. 430, 5 S. W. 783; *Culver v. Judges Superior Court*, 57 Mich. 25, 23 N. W. 469; *Hul v. Townley*, 45

Minn. 167, 47 N. W. 653; *Demuth v. Kennedy* (N. J. Ch.) 13 N. J. L. J. 150; *Collier v. Miller*, 62 Hun (N. Y.) 99, 16 N. Y. Supp. 633, 42 N. Y. S. R. 66; *New York Life Insurance Co. v. Aitkin*, 58 N. Y. Super. Ct. (26 Jones & S.) 586 mem., 11 N. Y. Supp. 349, reversed in 125 N. Y. 660, 26 N. E. 732, 36 N. Y. S. R. 8; *Boardman v. Dennaforde*, 23 N. S. 529.

⁶⁵ *Boardman v. Dennaforde*, 23 N. S. 529. This decision was by a divided court.

⁶⁶ In *Minnesota* it is said the claim therefor must be presented, allowed, and enforced as other

deceased are not personally liable for the mortgage debt;⁶⁷ yet a judgment for the deficiency in an action to foreclose a mortgage made by a testator may, under the New York Code,⁶⁸ be rendered against a legatee who has received a sum from the estate, to the extent of the amount he has received.⁶⁹ It is said in New Jersey that a decree for deficiency entered on foreclosure cannot be enforced against heirs by execution first issued after defendant's death; a bill and subpœna being necessary.⁷⁰

The supreme court of Michigan, in the case of *Culver v. Judges of Superior Court*,⁷¹ say the rule that no proceeding at law can be taken to enforce payment of a deficiency on foreclosure, without leave of the court in which the foreclosure was had, applies only to remedies upon the personal securities given with the mortgage, and not to an action begun by leave of the equity court upon the bond of the mortgagor's residuary legatee. And the supreme court of New York, in the case of the *New York Life Insurance Company v. Aitkin*,⁷² say that an action against the executor of one who has assumed a mortgage on premises purchased cannot be maintained to recover a deficiency on foreclosure, where the executor was not made a party after the purchaser had died before the suit, and he had also been released by the immediate grantor.

§ 741. Judgment for deficiency against third persons.—

In the absence of a statutory provision giving the court authority therefor, a judgment for the deficiency arising after the application of the proceeds of the sale of the mortgaged premises to the payment of the debt secured, cannot be taken

claims against the estate of the deceased mortgagor. *Hill v. Townley*, 45 Minn. 167, 47 N. W. 653.

⁶⁷ *Pillow v. Santelle*, 49 Ark. 430, 5 S. W. 783.

⁶⁸ N. Y. Code Civ. Proc. §§ 1837-1841.

⁶⁹ *Collier v. Miller*, 62 Hun (N. Y.) 99, 16 N. Y. Supp. 633, 42 N. Y. S. R. 66.

⁷⁰ *Demuth v. Kennedy* (N. J. Ch.) 13 N. J. L. J. 150.

⁷¹ 57 Mich. 25, 23 N. W. 469.

⁷² 58 N. Y. Super. Ct. (26 Jones

against any person liable for the debt, other than the mortgagor himself.⁷³ And it has been held to be erroneous to render a judgment against a person, who guaranteed the collection of a note secured by a mortgage, for any deficiency which might be found due after the sale of the mortgaged premises; the holder of the note and mortgage must exhaust his remedies against the mortgagor and the mortgaged property before he can proceed against the guarantor.⁷⁴

A grantor of lands, the title to which is taken in the name of only one of the grantees, who gives his note, secured by mortgage on the lands conveyed, for the unpaid purchase money, is restricted, in the absence of fraud, accident or mistake, to the security so taken, and cannot recover a deficiency judgment against the other purchasers who did not sign the note.⁷⁵

On the same principle, a purchaser of part of mortgaged property, who has never assumed any personal liability for the mortgage debt, is not liable for a deficiency on a foreclosure thereof.⁷⁶ But where the grantee of the whole or a portion of the mortgaged premises has assumed and agreed to pay the mortgage debt as part of the purchase price thereof, a judgment for deficiency may be rendered against him equally with the mortgagor; and where such judgment is not awarded in the decree the defect may be remedied by amendment. Thus it has been held by the New Jersey court of chancery, in the case of *Forman v. Manley*,⁷⁷ that the decree in foreclosure against a mortgagor grantor and a grantee who assumed the payment of the mortgage, may be amended

& S.) 586, mem. 11 N. Y. Supp. 349, reversed in 125 N. Y. 660, 26 N. E. 732, 36 N. Y. S. R. 8.

⁷³ See *Doan v. Holly*, 25 Mo. 357, 26 Mo. 186; *Faesi v. Goetz*, 15 Wis. 231.

⁷⁴ *Borden v. Gilbert*, 13 Wis. 670. See *ante*, § 253.

⁷⁵ *Reeves v. Wilcox*, 35 Neb. 779,

53 N. W. 978. Compare *Reynolds v. Dietz*, 34 Neb. 265, 31 N. W. 747. See *post*, § 743.

⁷⁶ *Hall v. Young*, 29 S. C. 64, 6 S. E. 938.

⁷⁷ 52 N. J. Eq. (7 Dick.) 712, 29 Atl. 434. See *Grand Island Sav. & L. Assoc. v. Moore*, 40 Neb. 686, 59 N. W. 115.

seventeen years after it was rendered, by inserting the clause of assumption; and the execution may be granted against the grantee on the motion of the mortgagor, where both defendants were served with process and notice of prayer for decree for deficiency, which was rendered, and it does not appear that the grantee had relied on the defect in the bill, or will be prejudiced by the proposed amendment.

In some states the only remedy against a third person liable for a mortgage debt for the deficiency arising upon the sale of the mortgaged property, is by a separate action at law after the deficiency has been ascertained. But where a complaint improperly joins these different causes of action, objection thereto must be taken by action or demurrer or it will be deemed to have been waived;⁷⁸ if no objection is taken, a decree for the deficiency may be entered, although not expressly authorized by statute.⁷⁹ The statutory jurisdiction for enforcing the collateral obligations of third persons upon a mortgage foreclosure is permissive and not obligatory, and will not be exercised to their prejudice, unless they have made it necessary by their agreements.⁸⁰

It has been held, that mere delay in foreclosing a mortgage, on which the interest has been regularly paid, if there has been no request or notice to foreclose, will not charge upon the mortgagee the consequences of a depreciation in the value of the property, and will not relieve persons liable for the payment of the mortgage debt as sureties from the effects of a judgment of deficiency.⁸¹

The supreme court of South Carolina say, in the case of

⁷⁸ *McCarthy v. Gerraghty*, 10 Ohio St. 438; *Baird v. McConkey*, 20 Wis. 297; *Cary v. Wheeler*, 14 Wis. 281; *Jessop v. City Bank of Racine*, 14 Wis. 331; *Stillwell v. Kellogg*, 14 Wis. 461.

⁷⁹ *McCarthy v. Gerraghty*, 10 Ohio St. 438; *Cary v. Wheeler*, 14 Wis. 281.

⁸⁰ *Gage v. Jenkinson*, 58 Mich. 169.

⁸¹ *Merchants' Ins. Co. of the City of New York v. Hinman*, 34 Barb. (N. Y.) 410, 13 Abb. (N. Y.) Pr. 110. See *Newcomb v. Hale*, 90 N. Y. 326, 43 Am. Rep. 173.

Edwards v. Dargan,⁸² that a mortgagee in possession of property is not liable to any personal judgment in favor of a junior mortgage in an action by the latter to foreclose the mortgage, although the latter may be entitled to foreclose because the property is insufficient to pay both; and the Illinois court of appeals, in the case of McKenzie v. Hartford Life and Accident Insurance Company,⁸³ say that a personal judgment should not be granted against the surviving husband and the heir-at-law of the mortgagor, in a suit to foreclose a mortgage to secure notes not signed by them, in the absence of proof that they have in any manner become liable for the payment of the notes.

It is thought that in a suit by a trustee substituted in the place of an executor, to foreclose a mortgage given to the latter by defendant, judgment cannot be rendered against the trust estate for the balance above the mortgage found to be due to the defendant for services rendered the executor for the estate, in the absence of any agreement creating a lien on the estate.⁸⁴

The New Jersey court of errors and appeals say in Dodd v. Fisher,⁸⁵ that a person who deposits a sum of money to obtain a postponement of a foreclosure sale for a specified time, and to indemnify the mortgagee against any deficiency that may arise on the sale, is not discharged from liability by the advice of the mortgagee's counsel to the sheriff to let a bid made at a sale stand without payment of a percentage thereof as required by the conditions of sale, and by the failure of such bidder to take the property, and its subsequent resale at a smaller price, where the advice was not given under such circumstances as to indicate a disregard of the indemnifier's rights.

⁸² 30 S. C. 177, 8 S. E. 858.

⁸³ 42 Ill. App. 157.

⁸⁴ *United States Trust Co. v.*

Stanton, 47 N. Y. S. R. 422, 19 N. Y. Supp. 986.

⁸⁵ 31 Atl. 392.

§ 742. Deficiency against assignor guaranteeing payment.—The assignor of a bond and mortgage, who guarantees their payment, will be liable on such guaranty for any deficiency that may arise upon a foreclosure and sale.⁸⁶ While a person who has guaranteed the collection of a mortgage is a proper defendant to a foreclosure, yet the decree of sale in such a case should provide that no execution shall issue against him until an execution against the parties primarily liable has been returned unsatisfied;⁸⁷ such a guaranty is merely a conditional undertaking to pay any deficiency that may arise on foreclosure, and not an absolute guaranty to pay the debt.⁸⁸

Where a guarantor dies pending an action to foreclose a mortgage, the court will have no power to order a judgment for deficiency against him *nunc pro tunc*, for the mortgage debt; it will be necessary to revive the action against his personal representatives.⁸⁹

Under the Wisconsin statute,⁹⁰ where a joint and several guaranty is secured by the mortgage of only one of the guarantors, all of them may be made defendants to an action for the foreclosure of the mortgage, and a personal judgment may be obtained against them for any deficiency.⁹¹ Where,

⁸⁶ *Vanderbilt v. Schreyer*, 91 N. Y. 392. See *Officer v. Burchell*, 44 N. Y. Supr. Ct. (12 J. & S.) 575; *Rushmore v. Gracie*, 4 Edw. Ch. (N. Y.) 84; *Bristol v. Morgan*, 3 Edw. Ch. (N. Y.) 142; *Jarman v. Wiswall*, 24 N. J. Eq. (9 C. E. Gr.) 267. Such a guarantor, although only conditionally liable, was prior to the adoption of the Code of Civil Procedure, by force of the statute (2 N. Y. Rev. Stat. 191, §§ 153, 154), properly made a party defendant in an action to foreclose the mortgage, and judgment therein against him for a deficiency was properly granted. *Vanderbilt v.*

Schreyer, 91 N. Y. 392. See *ante*, §§ 253-256.

⁸⁷ See *Harlem Sav. Bank v. Mickelsburgh*, 57 How. (N. Y.) Pr. 106; *Leonard v. Morris*, 9 Paige Ch. (N. Y.) 90; *Curtis v. Tyler*, 9 Paige Ch. (N. Y.) 432.

⁸⁸ *Vanderbilt v. Schreyer*, 91 N. Y. 392.

⁸⁹ *Grant v. Griswold*, 82 N. Y. 569, aff'g 21 Hun (N. Y.) 509.

⁹⁰ Wis. Rev. Stat. § 3156.

See also *Cottrell v. New London Furniture Co.* 94 Wis. 176, 68 N. W. 874.

⁹¹ *Fon du Lac Harrow Co. v. Haskins*, 51 Wis. 135.

upon the sale of a bond and mortgage, the assignor guarantees their payment, he will not necessarily be released from his liability on such guaranty by the failure of the assignee to comply with a notice requiring him to collect the indebtedness by legal proceedings, although the property may have depreciated in value and the obligor become insolvent after the service of the notice.⁹²

Where a person assigns a bond and mortgage, guaranteeing their collection, and thereby places himself in the position of a surety for the payment of the debt, and subsequently, for his indemnity, takes the bond of a third person as collateral security for such payment, the principal creditor will, in equity, be entitled to the benefit of such collateral security; and this is true, though he may not originally have relied upon the credit of such collateral security, nor known of its existence. In an action to foreclose the mortgage, the obligor on such collateral bond may properly be made a defendant, to enable the plaintiff to obtain a decree against him for the payment of any deficiency which may remain after he has exhausted his remedy against the mortgagor.⁹³

Where a mortgagee, upon assigning his bond and mortgage, guarantees their payment, the extent of his liability in case of a deficiency, if he received less than the face of the mortgage, will be limited to the actual amount paid for the bond and mortgage by the purchaser, with interest, although a larger consideration may be expressed in the assignment.⁹⁴

§ 743. Deficiency against party assuming mortgage.—Most of the states have enacted statutes, giving to their courts authority to render personal judgments in mortgage foreclosures for any deficiency arising after the application of the

⁹² *Newcomb v. Hale*, 90 N. Y. 326, 43 Am. Rep. 173. See *ante*, §§ 253-256.

⁹³ *Curtis v. Tyler*, 9 Paige Ch. (N. Y.) 432.

⁹⁴ *Rapelye v. Anderson*, 4 Hill (N. Y.) 472. See *Goldsmith v. Brown*, 35 Barb. (N. Y.) 484.

proceeds of the sale of the property to the payment of the mortgage debt; under such statutes a judgment for deficiency may be rendered against the mortgagor, or against a party who has assumed the payment of the mortgage debt,⁹⁵ or against any one who has become a guarantor or surety of it,⁹⁶ or who has given a collateral undertaking for its payment.⁹⁷ The supreme court of Kansas, in the case of the Northwestern

⁹⁵ *Grand Island Sav. & Loan Assoc. v. Moore*, 40 Neb. 686, 59 N. W. 115; *Forman v. Manley*, 52 N. J. Eq. (7 Dick.) 712, 29 Atl. 434; *Johns v. Wilson*, 180 U. S. 440, 21 S. Ct. 445 (Ariz.). See *Thompson v. Cheesman*, 15 Utah, 43, 48 Pac. 477; *Flint v. Winter Harbor Land Co.* 89 Me. 420, 36 Atl. 634; *Marshall v. Davies*, 78 N. Y. 414; *Gifford v. McCloskey*, 38 Hun (N. Y.) 350; *Douglass v. Wells*, 18 Hun (N. Y.) 88; *Tuttle v. Armstead*, 53 Conn. 175; *Bassett v. Bradley*, 48 Conn. 224; *Bay v. Williams*, 112 Ill. 91, 54 Am. Rep. 209; *Birke v. Abbott*, 103 Ind. 1, 53 Am. Rep. 474, 1 N. E. 485; *Wright v. Briggs*, 99 Ind. 563; *Ellis v. Johnson*, 96 Ind. 377; *Logan v. Smith*, 70 Ind. 597; *Gage v. Jenkinson*, 58 Mich. 169; *Unger v. Smith*, 44 Mich. 22; *Fitzgerald v. Barker*, 70 Mo. 685; *Heim v. Vogel*, 69 Mo. 529; *Bond v. Dolby*, 17 Neb. 491; *Cubberly v. Yager*, 42 N. J. Eq. (15 Stew.) 289; *Vreeland v. VanBlarcom*, 35 N. J. Eq. (8 Stew.) 530; *Allen v. Allen*, 34 N. J. Eq. (7 Stew.) 493; *Trustees for support of Public Schools v. Anderson*, 30 N. J. Eq. (3 Stew.) 366; *Brewer v. Maurer*, 38 Ohio St. 543, 43 Am. Rep. 436; *Davis v. Hullett*, 58 Vt. 90; *Palmeter v. Carey*, 63 Wis. 426. See also *Biddle v. Pugh*, 59 N. J. Eq. 480, 45 Atl. 626; *Rabb v. Texas Loan & Investment*

Co. 96 S. W. 77 (Tex. Civ. App.); *Howard v. Robbins*, 67 App. Div. 245, 73 N. Y. Supp. 172. See *ante*, §§ 238-252. Where a party purchases real estate and assumes to pay one-half of certain mortgages thereon, he is a proper party to a foreclosure of one of the mortgages, but he is liable to a personal judgment for only one-half of the mortgage debt. *Logan v. Smith*, 70 Ind. 597.

The cases on this point, however, are not in harmony. Some of the courts hold that no action lies by the mortgagee, on a promise made to the vendee by the purchaser of an equity of redemption to assume and pay the mortgage on the land, as part of the consideration named in the deed, because it is a promise to a third person. *Meech v. Ensign*, 49 Conn. 191, 44 Am. Rep. 225; *Wallace v. Furber*, 62 Ind. 103; *Prentice v. Brimhall*, 123 Mass. 291; *Booth v. Conn. Mut. Life Ins. Co.* 43 Mich. 299; *Stuart v. Worden*, 42 Mich. 154. But see *Bassett v. Bradley*, 48 Conn. 224.

⁹⁶ *Jones v. Steinbergh*, 1 Barb. Ch. (N. Y.) 250; *Bristol v. Morgan*, 3 Edw. Ch. (N. Y.) 142; *Jarman v. Wiswall*, 24 N. J. Eq. (9 C. E. Gr.) 267. See also *Sauer v. Steinbauer*, 14 Wis. 70.

⁹⁷ *Halsey v. Reed*, 9 Paige Ch. (N. Y.) 446.

Barb-Wire Company v. Randolph,⁹⁸ say that a personal judgment is properly rendered in a mortgage foreclosure against a grantee of land who assumed to pay certain mortgages, and conveyed the land by warranty deed to one who executed a subsequent mortgage to the holders of the former, for the amount of the mortgages assumed; and the proceeds of such judgment should be applied upon the mortgages assumed, to protect both the person to whom the covenant was made and the grantee with warranty. The supreme court of Nebraska say, in the case of *Reynolds v. Dietz*,⁹⁹ that upon foreclosure of a mortgage upon land sold to several persons who each advance a portion of the consideration, taking title in the name of one in trust for the others and assuming the mortgage by making it part of the consideration, each of the persons advancing part of the consideration is liable for his proportion of the deficiency, according to the share owned by him, and no more.¹

The mortgagee may also maintain an action at law against any such party whenever the attending circumstances justify the conclusion that the promise was made for his benefit.² But a mortgagee's right to proceed in equity against one who has assumed to pay his mortgage, does not extend to a claim for the purchase money on a sale of the mortgaged premises, nor to the vendor's lien to secure it.³ Where a person purchases mortgaged premises, assuming and agreeing to pay the mortgage debt as a part of the consideration of the conveyance, he thereby merely agrees to pay his own debt to a third person, who, by an equitable subrogation,

⁹⁸ 47 Kan. 420, 28 Pac. 170.

⁹⁹ 34 Neb. 265, 51 N. W. 747.

¹ Compare: *Reeves v. Wilcox*, 35 Neb. 779, 53 N. W. 978, in which the court held that where the title to lands is taken in the name of only one of the grantees who gives his individual note, secured by mortgage on the lands conveyed, for the

unpaid purchase money, in the absence of fraud, accident or mistake, the grantor is restricted in his judgment for deficiency to the purchaser who signed the note.

² *Bassett v. Bradley*, 48 Conn. 224.

³ *Emley v. Mount*, 32 N. J. Eq. (5 Stew.) 470.

stands in the place of the promisee vendor.⁴ In those cases where the mortgagor sells the equity of redemption subject to the mortgage, and the purchaser assumes and agrees to pay the mortgage debt as a portion of the purchase money, the grantee becomes personally liable for the payment of the debt in the first instance; if the mortgagor is subsequently compelled to pay such debt, he may recover it from his grantee in an action in equity or at law.⁵

While one who takes a deed of mortgaged land will be personally liable on the foreclosure of the mortgage, if his deed expressly binds him to pay the debt,⁶ yet a covenant to pay cannot be implied from either the deed or the mortgage.⁷ Where a purchaser accepts and holds under a deed containing a clause reciting that he assumes and agrees to pay a note secured by an existing mortgage on the land, he thereby subjects himself to a liability for a personal judgment for any deficiency that may exist after the sale of the premises under a decree of foreclosure; and such liability may be enforced on the foreclosure.⁸

⁴ *Bassett v. Bradley*, 48 Conn. 224. See *ante*, §§ 238-252.

⁵ *Comstock v. Drohan*, 71 N. Y. 9; *Hartley v. Harrison*, 24 N. Y. 170; *Russell v. Pistor*, 7 N. Y. 171, 57 Am. Dec. 509; *Cornell v. Prescott*, 2 Barb. (N. Y.) 16; *Ferris v. Crawford*, 2 Den. (N. Y.) 595; *Thayer v. Marsh*, 11 Hun (N. Y.) 501; *Marsh v. Pike*, 10 Paige Ch. (N. Y.) 595; *Halsey v. Reed*, 9 Paige Ch. (N. Y.) 447; *Blyer v. Monholland*, 2 Sandf. Ch. (N. Y.) 478. As to the liability of the grantee of a grantee, see *Marsh v. Pike*, 10 Paige Ch. (N. Y.) 595.

⁶ *Ranney v. McMullen*, 5 Abb. (N. Y.) N. C. 246; *Wales v. Sherwood*, 52 How. (N. Y.) Pr. 413.

⁷ *Equitable Life Ins. Co. v. Bost-*

wick, 100 N. Y. 628; *Gage v. Jenkinson*, 58 Mich. 169.

⁸ *Gifford v. McCloskey*, 38 Hun (N. Y.) 350; *Bay v. Williams*, 112 Ill. 91, 54 Am. Rep. 209; *Scarry v. Eldridge*, 63 Ind. 44; *Unger v. Smith*, 44 Mich. 22; *Winans v. Wilkie*, 41 Mich. 265; *Carley v. Fox*, 38 Mich. 387; *Miller v. Thompson*, 34 Mich. 10; *Crawford v. Edwards*, 33 Mich. 360; *Fitzgerald v. Barker*, 70 Mo. 685; *Heim v. Vogel*, 69 Mo. 529; *Davis v. Hulett*, 58 Vt. 90; *Gibson v. Hambleton*, 52 Neb. 601. 72 N. W. 1033; *Windle v. Hughes*, 40 Or. 1, 65 Pac. 1058; *Fisher v. White*, 94 Va. 236, 26 S. E. 573.

In *Lea v. Rabbri*, 45 N. Y. Supr. Ct. (13 J. & S.) 361, it was held that where premises were conveyed,

§ 744. Mortgaged premises primary fund—Subsequent liability.—Where mortgaged premises are sold to a person who takes them subject to a mortgage and assumes and agrees to pay the mortgage debt as a part of the consideration for the conveyance, the mortgaged premises are the primary fund for the payment of the mortgage debt,⁹ and thereafter, the party purchasing will be liable,¹⁰ and his grantor, the original mortgagor, will stand in the position of a surety to such defendant.¹¹ The obligation of the purchaser inures in equity to the benefit of the holder of the mortgage,¹² who, upon foreclosure, is entitled to a judgment against such purchaser for any deficiency which may exist after the application of the proceeds of the sale to the mortgage debt.¹³

“subject to a certain mortgage on the southerly portion of the same” made by the vendor, which mortgage the vendee assumed and agreed to pay, by a clause in the conveyance, which stated that the amount of the debt has “been deducted from the consideration hereinbefore expressed,” there is no equitable lien upon the mortgaged premises in favor of the vendor; this, though the vendee, after paying interest for a certain time, makes default, and allows the mortgage to be foreclosed and the vendor to be thereby charged with a judgment for deficiency. The assumption of the mortgage is *pro tanto* the consideration. A *fortiori*, there is no equitable lien upon that portion of the premises not covered by the mortgage. See *ante*, §§ 238–252.

⁹ *Boucofski v. Jacobsen*, 36 Utah, 165, 26 L.R.A.(N.S.) 898, 104 Pac. 117; *Birke v. Abbott*, 103 Ind. 1, 53 Am. Rep. 474, 1 N. E. 485. And this is true, although the deed may

contain a covenant on the part of the grantee to pay the mortgage debt, such covenant being intended to indemnify the grantor against the contingency that the land may not bring enough to pay such debt. *Wilbur v. Warren*, 104 N. Y. 192.

¹⁰ *Ellis v. Johnson*, 96 Ind. 377.

¹¹ *Drury v. Clark*, 16 How. (N. Y.) Pr. 424. See *ante*, § 223 and chap. xi.

¹² *Wager v. Ling*, 150 N. Y. 549, 44 N. E. 1103. See also *Eakin v. Shultz*, 61 N. J. Eq. 156, 47 Atl. 274.

¹³ See *Ricard v. Sanderson*, 41 N. Y. 179; *Ranney v. McMullen*, 5 Abb. (N. Y.) N. C. 246; *Thayer v. Marsh*, 11 Hun (N. Y.) 501, *aff'd* 75 N. Y. 340; *Comstock v. Drohan*, 8 Hun (N. Y.) 373, *aff'd* 71 N. Y. 9; *Halsey v. Reed*, 9 Paige Ch. (N. Y.) 446; *Stiger v. Mahone*, 24 N. J. Eq. (9 C. E. Gr.) 426; *Hoy v. Bramhall*, 19 N. J. Eq. (4 C. E. Gr.) 563, 97 Am. Dec. 687; *Klapworth v. Dressler*, 13 N. J. Eq. (2 Beas.) 62, 78 Am. Dec. 69.

But where a mortgagor sells the mortgaged premises, receiving the full consideration therefor, and his conveyance is not made subject to the payment of the mortgage, he will remain the principal debtor, and the land simply security for the debt, although the deed may contain no covenant of title on the part of the grantor.¹⁴ In an action to foreclose a mortgage, where more than one party is personally liable for the payment of the mortgage debt, the judgment should provide for issuing an execution for the deficiency against the several defendants in the order in which they are liable as principal or surety.¹⁵

§ 745. Assumption of mortgage—Defense by grantee.—The purchaser of mortgaged premises, who assumes the payment of the mortgage as a part of the consideration of the conveyance, is liable to the mortgagee and is a proper party to foreclose under the Code;¹⁶ he is estopped from contesting the validity of the mortgage, and will be liable to his grantor if the latter is compelled to pay any part of the mortgage debt.¹⁷ Proof of the recorded deed containing such covenants raises the presumption that the title is vested in the grantee and that he is liable.¹⁸

The grantor cannot, by any act or agreement of his own, release or affect his grantee's liability to the mortgagee, except where an oral agreement is made contemporaneously with the conveyance in which the grantee assumed the mortgage, to the effect that the grantor will, at any time, accept a reconveyance and release the grantee from his covenant;

¹⁴ *Wadsworth v. Lyon*, 93 N. Y. 201, 45 Am. Rep. 190.

¹⁵ *Luce v. Hinds*, Clarke Ch. (N. Y.) 453; *Weed v. Calkins*, 24 Hun (N. Y.) 582; *Curtis v. Tyler*, 9 Paige Ch. (N. Y.) 432, 435. See *ante*, § 223 and chap. xi.

¹⁶ N. Y. Code Civ. Proc. § 1627; *Ayers v. Dixon*, 78 N. Y. 318.

¹⁷ *Parkinson v. Sherman*, 74 N. Y. 88, 30 Am. Rep. 268; *Comstock v. Drohan*, 71 N. Y. 9; *Fairchild v. Lynch*, 46 N. Y. Supr. Ct. (14 J. & S.) 1; *Thayer v. Marsh*, 11 Hun (N. Y.) 501. See *ante*, §§ 238-252.

¹⁸ *Lawrence v. Farley*, 24 Hun (N. Y.) 293.

and where such a verbal agreement has been carried out, the liability of the grantee on the mortgage will be extinguished.¹⁹ A grantee who assumes the payment of a mortgage will be deemed to have entered into an express undertaking to pay the debt, although he may not sign but merely accept the deed by which the conveyance is made.²⁰

§ 746. Assumption of mortgage—When grantee not liable for deficiency.—Where a grantee has assumed the payment of a mortgage, he will not be liable for a judgment of deficiency unless his grantor was liable.²¹ Where a deed contains a covenant that the grantee shall pay the mortgage on the property, an extension of the time of payment by the holder of the mortgage will discharge the grantor; ²² and when the mortgagee releases the grantee, he will thereby discharge the mortgagor also from liability.²³

¹⁹ *Devlin v. Murphy*, 5 Abb. (N. Y.) N. C. 242, 56 How. (N. Y.) Pr. 326.

²⁰ *Smith v. Truslow*, 84 N. Y. 660; *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35, 13 Am. Rep. 556; *Ricard v. Sanderson*, 41 N. Y. 179; *Belmont v. Coman*, 22 N. Y. 438, 78 Am. Dec. 213; *Collins v. Rowe*, 1 Abb. (N. Y.) N. C. 97; *Marsh v. Pike*, 10 Paige Ch. (N. Y.) 595; *Furnas v. Durgin*, 119 Mass. 500, 20 Am. Rep. 341; *Miller v. Thompson*, 34 Mich. 10; *Taylor v. Preston*, 79 Pa. St. 436. See *ante*, §§ 250–251.

²¹ *Cashman v. Henry*, 75 N. Y. 103, 31 Am. Rep. 437; *Vrooman v. Turner*, 69 N. Y. 280, 25 Am. Rep. 195; *Smith v. Cross*, 16 Hun (N. Y.) 487; *Norwood v. DeHart*, 30 N. J. Eq. (3 Stew.) 412; *Jenkins v. Bishop*, 136 App. Div. 104, 120 N. Y. Supp. 825; *Eakin v. Shultz*, 61 N. J. Eq. 156, 47 Atl. 274; *New England Trust Co. v. Nash*, 5 Kan.

App. 739, 46 Pac. 987; *Morris v. Mix*, 4 Kan. App. 654, 46 Pac. 58; *Hicks v. Hamilton*, 144 Mo. 495, 66 Am. St. Rep. 431, 46 S. W. 432. See *Williams v. VanGeison*, 76 App. Div. 592, 79 N. Y. Supp. 95. See also *Bonhoff v. Wiehorst*, 57 Misc. 456, 108 N. Y. Supp. 437. But see *Cobb v. Fishel*, 15 Colo. App. 384, 62 Pac. 625.

²² *Spencer v. Spencer*, 95 N. Y. 353; *Marshall v. Davies*, 78 N. Y. 414, reversing 16 Hun (N. Y.) 606; *Calvo v. Davies*, 73 N. Y. 211, aff'g 8 Hun (N. Y.) 222, 29 Am. Rep. 130. See *Knoblock v. Zschwetzke*, 53 N. Y. Supr. Ct. (21 J. & S.) 391, 1 N. Y. State Rep. 238.

²³ *Paine v. Jones*, 76 N. Y. 274, aff'g 14 Hun (N. Y.) 577; *Riggs v. Boucicault*, 33 Hun (N. Y.) 667, 20 N. Y. Wk. Dig. 184. See *Woodward v. Brown*, 119 Cal. 283, 63 Am. St. Rep. 108, 51 Pac. 542. See *ante*, §§ 238–252.

It has been held, however, that one liable for the deficiency will not be released because the time for completing the sale was extended and a resale subsequently ordered, without proceeding against the original purchaser to compel him to complete his purchase, if it does not appear that the purchaser was personally responsible and that his bid could have been enforced. Neither will he be released where it does not appear that, if the resale had been ordered immediately, the mortgaged premises would have brought more; particularly is this true where no fraud was practiced and no request was made that the purchaser should be proceeded against,—for the plaintiff in a foreclosure may elect to apply for a resale or to compel the purchaser to complete his purchase.²⁴

It has been held, where a grantee takes a conveyance by a warranty deed containing a covenant to pay the mortgage, and he is subsequently evicted by a paramount title, that he will not be liable on a judgment for deficiency, because the consideration for the covenant has wholly failed.²⁵ And in an action to foreclose a mortgage, parol evidence is admissible to show that the clause in a deed, whereby the grantee assumes the mortgage, was inserted by mistake and without the knowledge of such grantee.²⁶ And where the grantee in a conveyance containing such a clause, was unable to produce the evidence that the clause was inserted by mistake and allowed judgment to be taken against him by default, but two years later found the evidence, the judgment was opened on motion and he was allowed to come in and defend.²⁷

§ 747. Release from liability on assumption.—Whether the personal liability incurred by the grantee to the holder of a mortgage, by assuming its payment, can be released by a sub-

²⁴ *Goodwin v. Simonson*, 74 N. Y. 133.

²⁵ *Dunning v. Leavitt*, 85 N. Y. 30, 39 Am. Rep. 617, reversing 20 Hun (N. Y.) 173.

²⁶ *DeyErmand v. Chamberlain*, 88 N. Y. 658. See *ante*, §§ 238–252.

²⁷ *Trustees, &c. v. Merriam*, 59 How. (N. Y.) Pr. 226. See also *Union Dime Saving Institution v. Clark*, 59 How. (N. Y.) Pr. 342.

sequent agreement between such grantee and his grantor, is an unsettled question.²⁸ Thus, it is held in New Jersey, that the covenant by a grantee to pay the mortgage debt is a contract only for the indemnity of the grantor, and may be released or discharged by him;²⁹ but that a release given without consideration by an insolvent grantor, after notice of foreclosure, and for the sole and admitted purpose of defeating the mortgagee's claim for a judgment of deficiency, is void in equity.³⁰

On the other hand, it has been held in Illinois³¹ and in New York,³² that such an agreement to pay the mortgage debt, creates an absolute and irrevocable obligation in favor of the mortgagee, which cannot be released or affected by any act or agreement of the mortgagor or the grantee to which the mortgagee does not assent; in other cases, it is held that such an agreement becomes irrevocable only after it has been accepted and acted upon by the mortgagee.³³

Where a grantee, who has assumed the payment of a mortgage, subsequently reconveys the land in good faith to his grantor, who in turn assumes the payment of such debt, the liability of the first grantee to the holder of the mortgage will be thereby terminated.³⁴

²⁸ See *Judson v. Dada*, 79 N. Y. 373; *Hartley v. Harrison*, 24 N. Y. 170; *Douglass v. Wells*, 18 Hun (N. Y.) 88; *Stephens v. Casbacker*, 8 Hun (N. Y.) 116; *Bay v. Williams*, 112 Ill. 91, 54 Am. Rep. 209; *Berkshire Life Ins. Co. v. Hutchings*, 100 Ind. 496; *Young v. Trustees for the support of Public Schools*, 31 N. J. Eq. (4 Stew.) 290; *Trustees for the support of Public Schools v. Anderson*, 30 N. J. Eq. (3 Stew.) 366; *Brewer v. Maurer*, 38 Ohio St. 543, 43 Am. Rep. 436.

²⁹ *Young v. Trustees for the sup-*

port of Public Schools, 31 N. J. Eq. (4 Stew.) 290. See *ante*, § 251.

³⁰ *Trustees for the support of Public Schools v. Anderson*, 30 N. J. Eq. (3 Stew.) 366.

³¹ *Bay v. Williams*, 112 Ill. 91, 54 Am. Rep. 209.

³² *Douglass v. Wells*, 18 Hun (N. Y.) 88. See *ante*, §§ 250, 251.

³³ See *Berkshire Life Ins. Co. v. Hutchings*, 100 Ind. 496; *Brewer v. Maurer*, 38 Ohio St. 543, 43 Am. Rep. 436.

³⁴ *Laing v. Bryne*, 34 N. J. Eq. (7 Stew.) 52. But see *ante*, § 252.

§ 748. No liability where deed subject to mortgage.—

It is well settled that the acceptance of a conveyance containing words importing that the grantee will pay the mortgage, which is a lien upon the premises purchased, binds him to discharge such incumbrance as effectually as though he had signed the deed. No express or formal words are necessary to create this obligation, as the liability depends entirely upon the agreement of the parties;³⁵ yet the mere fact that the grantee purchases subject to the mortgage, and that a clause to that effect was inserted in the deed, will not alone render the grantee personally liable for the mortgage debt nor create such liability; the words used must clearly show that such obligation was intended by the one party and knowingly assumed by the other.³⁶

As between the mortgagor and his grantee, the latter is secondarily liable for the whole mortgage debt, the land conveyed being primarily liable.³⁷ A grantee purchasing mortgaged premises subject to the incumbrance, not being personally liable for the debt, will simply lose the premises in case of foreclosure,³⁸ because in such case the land is the primary fund for the payment of the debt, and must be so applied.³⁹

The most that can be claimed for the words "under and subject to" in a conveyance of land, is that as between the parties, they create a covenant of indemnity to the grantor on

³⁵ *Belmont v. Coman*, 22 N. Y. 438, 78 Am. Dec. 213.

³⁶ *Equitable Life Assurance Soc. v. Bostwick*, 100 N. Y. 628; *Smith v. Truslow*, 84 N. Y. 660; *Collins v. Rowe*, 1 Abb. (N. Y.) N. C. 97; *Johnson v. Monell*, 13 Iowa, 300; *Fiske v. Tolman*, 124 Mass. 254, 26 Am. Rep. 659; *Strong v. Converse*, 90 Mass. (8 Allen) 557, 85 Am. Dec. 732; *Hall v. Morgan*, 79 Mo. 47; *Lawrence v. Towle*, 59 N. H. 28;

Woodbury v. Swan, 58 N. H. 380; *Walker v. Goldsmith*, 7 Oreg. 161. See ante, §§ 238-252.

³⁷ *Moore v. Clark*, 40 N. J. Eq. (13 Stew.) 152.

³⁸ *Winans v. Wilkie*, 41 Mich. 264.

³⁹ *Johnson v. Corbett*, 11 Paige Ch. (N. Y.) 265; *Halsey v. Reed*, 9 Paige Ch. (N. Y.) 446; *Forgy v. Merryman*, 14 Neb. 516. See *Roberts v. Fitzallen*, 120 Cal. 482, 52 Pac. 818.

the part of the grantee.⁴⁰ Yet it is said that where a purchaser buys mortgaged premises from the mortgagor subject to the mortgage debt, though the deed may not in terms bind him to pay such debt, he is to be treated, as between himself and the mortgagor, as having assumed the mortgage, and is personally liable for whatever deficiency may remain after the foreclosure sale.⁴¹

§ 749. Oral contract of assumption may be enforced.—Where, at the time of conveying land, it is orally agreed that the grantee shall assume and pay a mortgage, for the payment of which the grantor is liable, the latter may, if subsequently compelled to pay it, recover the amount so paid from the grantee, though the conveyance contains no agreement on the part of the grantee to assume the mortgage, but is only made subject to it.⁴² The grantee, however, may so contract with his grantor as to make himself personally liable to the mortgagee. Thus, where the amount of the mortgage debt forms a part of the consideration of the purchase, and by the contract is to be paid by the purchaser, he will be personally liable where he has retained that amount out of the purchase money.⁴³

But the deduction of the amount of the mortgage debt from the purchase price on a sale of the land, in the absence of an express agreement to pay, does not impose upon the grantee the absolute duty of paying the mortgage debt. While such deduction may be evidence of the grantor's intention to subject the land to such payment, it is not con-

⁴⁰ *Taylor v. Mayer*, 93 Pa. St. 42. See *Samuel v. Peyton*, 88 Pa. St. 465, also *ante*, § 254 and *post*, § 750.

⁴¹ *Canfield v. Shear*, 49 Mich. 313. It was held by the supreme court of Michigan in *Sheldon v. Holmes*, 58 Mich 138, that on the dismissal of a bill of foreclosure against a subsequent *bona fide* purchaser who has

not made full payment, he may be held for such sums as remain due after he has been notified of the complainant's equities.

⁴² *Taintor v. Hemmingway*, 18 Hun (N. Y.) 458.

⁴³ *Smith v. Truslow*, 84 N. Y. 660; *Winans v. Wilkie*, 41 Mich. 264. See *ante*, § 254.

trolling nor conclusive, and it may be inferred that the deduction was made to protect the grantee against an actionable incumbrance.⁴⁴

§ 750. Intention of parties determines question of assumption.—Whether a personal liability is assumed in any case is always dependent on the intention of the parties; unless the parties have declared this intention in express words no liability will be incurred.⁴⁵ If the deed merely recites that the land is taken subject to a certain mortgage, there will be no personal liability;⁴⁶ neither will the words “under and subject” to a mortgage which is specified, import a promise to pay, nor create a personal liability.⁴⁷ And even the words “each assumed to pay the mortgage” have been held to create no personal liability.⁴⁸

In those cases where there are words in the deed importing that the grantee is to pay the mortgage, subject to which he takes the land, he will be deemed to have entered into an express undertaking to do so by the mere acceptance of the deed, and by taking possession of the property under it.⁴⁹

The grantee of mortgaged premises will be liable for the payment of the mortgage debt only where such liability was a part of the bargain for the sale and conveyance of such

⁴⁴ *Bennett v. Bates*, 94 N. Y. 354.

⁴⁵ See *Rutland Savings Bank v. White*, 4 Kan. App. 435, 46 Pac. 29; *Blass v. Terry*, 156 N. Y. 122, 50 N. E. 953.

⁴⁶ *Belmont v. Coman*, 22 N. Y. 438, 78 Am. Dec. 213; *Hull v. Alexander*, 26 Iowa, 569.

⁴⁷ See *Girard Life Ins. & Trust Co. v. Stewart*, 86 Pa. St. 89; *Lenig's Estate*, 52 Pa. St. 135. See ante, § 748.

⁴⁸ *Southern Indiana Loan & Savings Institution v. Roberts*, 42 Ind. App. 653, 86 N. E. 490. See *Kreidler v. Hyde*, 120 Ill. App. 505; *Rut-*

land Savings Bank v. White, 4 Kan. App. 435, 46 Pac. 29.

⁴⁹ *Ricard v. Sanderson*, 41 N. Y. 179; *Belmont v. Coman*, 22 N. Y. 438, 78 Am. Dec. 213; *Lawrence v. Fox*, 20 N. Y. 268; *Trotter v. Hughes*, 12 N. Y. 74, 62 Am. Dec. 137; *Vail v. Foster*, 4 N. Y. 312; *Marsh v. Pike*, 10 Paige Ch. (N. Y.) 595; *Halsey v. Reed*, 9 Paige Ch. (N. Y.) 446; *Curtis v. Tyler*, 9 Paige Ch. (N. Y.) 432; *Blyer v. Monholland*, 2 Sandf. Ch. (N. Y.) 478; *Miller v. Thompson*, 34 Mich. 10.

premises.⁵⁰ Therefore, where a clause is inserted in the deed of conveyance without the knowledge of the grantee, by which he is made to assume and agree to pay the mortgage, and he has no knowledge or notice of the insertion of such clause until after the commencement of foreclosure proceedings, he may set up in his answer that the insertion of such clause was a fraud and without his knowledge, and he may have the deed reformed by striking out such clause.⁵¹

§ 751. No judgment of deficiency against non-resident.—A personal judgment for deficiency cannot be rendered against a non-resident who has not appeared in the action, or who has not been personally served with the summons within the state.⁵² Where the statute provides for service by publication, a judgment obtained against a non-resident upon such service can be enforced against the mortgaged property only; such a judgment does not impose a personal liability upon him.⁵³

But it has been said that due process of law, without which one cannot be bound by a judicial decree nor deprived of his property, does not necessarily require the personal service of a notice of the proceedings;⁵⁴ and that the legislature may declare that judgments obtained against a non-resident, upon service by publication, may be enforced against all property of such defendant found within the state where the judgment is rendered.⁵⁵

⁵⁰ *Parker v. Jenks*, 36 N. J. Eq. (9 Stew.) 398. See *Dey-Ermand v. Chamberlain*, 22 Hun (N. Y.) 110, aff'd 88 N. Y. 658. See also *Giesy v. Truman*, 17 App. D. C. 449.

⁵¹ *King, as trustee, etc. v. Sullivan*, 31 App. Div. 549, 52 N. Y. Supp. 130. See *Johns v. Wilson*, 6 Ariz. 125, 53 Pac. 583; *DeyErmand v. Chamberlain*, 88 N. Y. 658; *Albany City Sav. Inst. v. Burdick*, 87 N. Y. 40. See *ante*, § 745.

⁵² *Schwinger v. Hickok*, 53 N. Y. 280; *Lawrence v. Fellows*, Walk. Ch. (Mich.) 468. See *ante*, § 224.

⁵³ *Schwinger v. Hickok*, 53 N. Y. 280; *Latta v. Tutton*, 122 Cal. 279, 68 Am. St. Rep. 30, 54 Pac. 844.

⁵⁴ *In re Empire State Bank*, 18 N. Y. 199, 215. See *Schwinger v. Hickok*, 53 N. Y. 284.

⁵⁵ See *Bissell v. Briggs*, 9 Mass. 462, 6 Am. Dec. 88; *Boswell v. Otis*, 50 U. S. (9 How.) 336, 13 L. ed.

§ 752. No judgment of deficiency for installments not yet due.—On a mortgage foreclosure, a personal judgment cannot be rendered against the mortgagor, or other person liable for the payment of the debt, for any deficiency before such debt becomes due according to the contract.⁵⁶ It seems that a judgment of foreclosure for the whole amount due and to become due on several notes, secured by a mortgage or otherwise, is not erroneous, if rendered in conformity to law.⁵⁷ But it has been said that where a mortgage securing a debt payable in installments, some of which are due and others yet to become due, is foreclosed, the court can only direct, as to the installments not due, at what time and upon what default subsequent executions shall issue to collect the amounts of such installments.⁵⁸

Where a mortgage provides that, upon default in the payment of an installment of the debt, or in the payment of the interest, the whole debt shall immediately become due and payable, a personal judgment may be entered for the whole amount upon the first default in the payment of the principal or interest.⁵⁹

The supreme court of South Carolina, in the case of *Patterson v. Baxley*,⁶⁰ hold that a decree of foreclosure and sale rendered upon default in the payment of installments due, which, after ordering that upon the next installment becoming due the mortgagee have an order for the sale of the lands

164; *Thompson v. Emmert*, 4 McL. C. C. 96; *In re Linforth*, 87 Fed. 386.

⁵⁶ *Danforth v. Coleman*, 23 Wis. 528. See *Skelton v. Ward*, 51 Ind. 46; *Packard v. Kinzie Avenue Heights Co.* 96 Wis. 114, 70 N. W. 1066; also *ante*, § 225.

⁵⁷ *Allen v. Parker*, 11 Ind. 504.

⁵⁸ *Skelton v. Ward*, 51 Ind. 46. See *ante*, § 225.

⁵⁹ *Hatcher v. Chancey*, 71 Ga. 689; *Miller v. Remley*, 35 Ind. 539; *Hunt Mortg.* Vol. II.—70.

v. Harding, 11 Ind. 245; *Lacoss v. Keegan*, 2 Ind. 406; *Cecil v. Dynes*, 2 Ind. 266; *Greenman v. Pattison*, 8 Blackf. (Ind.) 465; *Darrow v. Scullin*, 19 Kan. 57; *Adams v. Essex*, 1 Bibb. (Ky.) 149, 4 Am. Dec. 623; *Reddick v. Gressman*, 49 Mo. 389; *Bank v. Chester*, 11 Pa. St. 282, 290, 51 Am. Dec. 547; *Scheibe v. Kennedy*, 64 Wis. 564, 567; *Manning v. McClurg*, 14 Wis. 350. See *ante*, § 225.

⁶⁰ 33 S. C. 354, 11 S. E. 1065.

for such installment, further orders that the mortgagee be at liberty, at any time thereafter when any deficiency shall be due, to apply to the court for an execution against all the defendants to collect the amount due,—includes the judgment for the deficiency, which is entered as of the date of the entry of the decree, although the deficiency is subsequently ascertained and confirmed.

§ 753. Deficiency—How determined.—In a mortgage foreclosure the mortgagor is entitled to be credited on the mortgage debt only with the net proceeds realized from the sale of the premises, and will continue liable for all deficiency remaining unpaid. The amount of the deficiency is to be ascertained by deducting from the proceeds of the sale all taxes and other liens, together with the expenses of the sale, and by treating the balance as net proceeds, which must be credited upon the amount due on the bond and mortgage for principal and interest; the balance then remaining unpaid will be the deficiency.⁶¹ A purchase by the plaintiff will not vary the rule.⁶²

It has been held that a defendant in an action in another state to recover the balance of the mortgage debt, after a foreclosure and sale of the mortgaged property in New York, cannot show that the real value of the property was greater

⁶¹ See *Bailey v. Block*, 134 S. W. 323 (Tex.); *Sidenberg v. Ely*, 90 N. Y. 257, 262-263, 43 Am. Rep. 163; *Marshall v. Davies*, 78 N. Y. 414, 58 How. (N. Y.) Pr. 231, reversing 16 Hun (N. Y.) 606; *Cornell v. Woodruff*, 77 N. Y. 203; *Williams v. Townsend*, 31 N. Y. 411, 414; *Robinson v. Ryan*, 25 N. Y. 320; *Eagle Fire Ins. Co. v. Pell*, 2 Edw. Ch. (N. Y.) 631; *Faure v. Winans*, Hopk. Ch. (N. Y.) 283, 14 Am. Dec. 545; *Brevoort v. Randolph*, 7 How. (N. Y.) Pr. 398; *Weed v. Hornby*, 35 Hun (N. Y.) 580, 582;

Burr v. Veeder, 3 Wend. (N. Y.) 412. See ante, § 225.

⁶² In the case of *Cornell v. Woodruff*, 77 N. Y. 203, by the judgment in a foreclosure suit and by the terms of sale, all liens upon the premises for taxes and assessments were to be deducted from the proceeds of the sale. The plaintiff became the purchaser. The premises were situated in the city of Brooklyn, and at the time of the sale several years' municipal taxes were in arrears, for which the mortgaged premises had been sold.

than the amount for which it was sold.⁶³ The judgment in a foreclosure fixes the amount due on the obligation and security, and is a final adjudication on that point; and no objections can be made to the issuing of an execution for the deficiency, unless they arose after the confirmation of the foreclosure sale and, recognizing the decree, tend to the satisfaction of the judgment.⁶⁴

Under the existing statutes of Wisconsin, a personal judgment against the mortgagor for the whole amount of the mortgage debt, or even for the deficiency after a sale of the mortgaged property, cannot be entered with the decree of foreclosure, though such decree may include a direction for a subsequent judgment of deficiency, if demanded in the complaint. A judgment for deficiency can be entered only after such deficiency has been duly ascertained, and it can be ascertained only after the sale has been made and confirmed. A judgment in violation of this rule will be reversed.⁶⁵

The supreme court of South Carolina, in the case of *Dial v. Gray*,⁶⁶ say that where joint debtors upon a note for a certain amount give a mortgage upon a lot owned by them jointly, to secure a certain proportion of such debt, and one of them gives a mortgage upon his individual property to secure the balance of the debt, in the absence of anything to show to

Certificates of sale had been issued, which were held by the plaintiff. No lease had been executed. After the foreclosure sale, the plaintiff caused the amount necessary to redeem the premises from the tax sales to be deposited in the proper office, and furnished to the sheriff the certificate of deposit and redemption, the amount of which he deducted from the purchase money as liens for taxes, and reported a deficiency against the mortgagor. Held no error; that the certificates of sale were liens to the amount necessary to redeem, *i. e.*, the

amount of taxes, expenses of sale and interest at the rate allowed by law upon such sales; and that the right to allow and deduct from the proceeds of sale the amount so necessary to redeem was not affected by the fact that the plaintiff himself held the certificates.

⁶³ *Belmont v. Cornen*, 48 Conn. 338.

⁶⁴ *Haldane v. Sweet*, 58 Mich 429.

⁶⁵ *Welp v. Gunther*, 48 Wis. 543. See *Bailey v. Block*, 134 S. W. 323. (Tex.)

⁶⁶ 27 S. C. 171, 3 S. E. 84.

the contrary, the respective parcels of land will be liable only for the portions of the debt secured upon them.

§ 754. When judgment for deficiency may be docketed.—In a mortgage foreclosure, a personal judgment cannot be rendered for the payment of any deficiency until the amount of such deficiency has been ascertained by the officer conducting the sale, and his report thereof has been confirmed by the court.⁶⁷ Whatever may be the form of the debt, an absolute personal judgment for any deficiency cannot be rendered on foreclosure, but only a contingent judgment against the defendants to the extent of any deficiency which may remain after the sale of the mortgaged premises.⁶⁸

It has been held that the court may make a contingent decree for the payment of any deficiency against the mortgagor, or other party personally liable for the mortgage debt, previous to the sale or after it, without waiting for the confirmation of the report of sale.⁶⁹ In New York there is no statutory limitation for the docketing of a deficiency judgment.⁷⁰

The supreme court of New York say that under a mortgage on lands partly in New York and partly in another state, the mortgagee is not bound to sell the land in the latter state before entering a judgment for deficiency.⁷¹ And the same

⁶⁷ *Hall v. Young*, 29 S. C. 64, 6 S. E. 938. See *Cook v. Moulton*, as trustee, etc., 64 Ill. App. 429; *Bache v. Doscher*, 41 N. Y. Supr. Ct. (9 J. & S.) 150; *DeAgreda v. Mañtel*, 1 Abb. (N. Y.) Pr. 130; *Cobb v. Thornton*, 8 How. (N. Y.) Pr. 66; *Cormerais v. Genella*, 22 Cal. 116; *Mickle v. Maxfield*, 42 Mich. 304; *Howe v. Lemon*, 37 Mich. 164; *Clapp v. Maxwell*, 13 Neb. 542, 547. See also *Hastings v. Alabama State Land Co.* 124 Ala. 608, 26 So. 881. (Vendor's Lien); *Lowe v. Weil*, 117 N. Y. Supp. 1025.

⁶⁸ *Brown v. Willis*, 67 Cal. 235. See *Siewert v. Hamel*, 33 Hun (N. Y.) 44; *Loeb v. Willis*, 22 Hun (N. Y.) 508.

⁶⁹ *McCarthy v. Graham*, 8 Paige Ch. (N. Y.) 480. But see *Cobb v. Thornton*, 8 How. (N. Y.) Pr. 66. ⁷⁰ *Brown v. Faile*, 112 App. Div. 302, 98 N. Y. Supp. 420.

⁷¹ *Clark v. Simmons*, 55 Hun (N. Y.), 175, 8 N. Y. Supp. 74, 28 N. Y. S. R. 738. See also *Tatum v. Ballard*, 94 Va. 370, 26 S. E. 871.

court say, in the case of *Hawley v. Whalen*,⁷² that a judgment for deficiency upon a foreclosure sale may properly be entered and docketed, notwithstanding a provision in the decree of foreclosure that a certain defendant pay any deficiency that may arise entitles plaintiff to issue execution therefor without further judgment.

The supreme court of California, in the case of *Toby v. Oregon Pacific Railroad Company*,⁷³ say that a deficiency judgment may be granted for the balance due, where a steamship, after a decree of foreclosure and sale thereof, has been sold by a receiver, under an interlocutory decree of the court, for less than the amount of the mortgage, and that sale has been confirmed, although California Code Civil Procedure, § 726, provides for a deficiency judgment only "if it appears from the sheriff's return that the proceeds are insufficient."

§ 755. When judgment for deficiency becomes a lien.—

A personal decree for the deficiency, after the application of the proceeds of the sale to pay the mortgage debt, does not have the force and effect of a judgment at law and become a lien upon the real property of the person against whom it is taken, until the excess of the mortgage debt over the proceeds of the sale has been ascertained and a subsequent judgment at law has been docketed.⁷⁴ But it has been held in Indiana, that whenever in a proceeding to foreclose a mortgage, the plaintiff is entitled to a personal judgment, and an order made under the statute, that after the sale of the mortgaged premises, the residue of the judgment remaining

⁷² 64 Hun (N. Y.) 550, 19 N. Y. Supp. 521, 46 N. Y. S. R. 512.

⁷³ 98 Cal. 490, 32 Pac. 550.

⁷⁴ *Mutual Life Ins. Co. v. Southard*, 25 N. J. Eq. (10 C. E. Gr.) 337; *Bell v. Gilmore*, 25 N. J. Eq. (10 C. E. Gr.) 104. See also *DeAgreda v. Mantel*, 1 Abb. (N.

Y.) Pr. 130; *Cobb v. Thornton*, 8 How (N. Y.) Pr. 66; *Englund v. Lewis*, 25 Cal. 337; *Chapin v. Broder*, 16 Cal. 403. See N. Y. Code Civ. Proc. § 1250. *French v. French*, 107 App. Div. 107, 94 N. Y. Supp. 1026.

unpaid, shall be levied on other property of the mortgagor, the judgment is from the date of its rendition a lien on all the lands of the mortgagor in the county.⁷⁵ In California, such a judgment becomes a lien upon the property of the debtor only from the time it is docketed.⁷⁶

§ 756. Execution for deficiency.—Upon the usual decree for the amount of the deficiency against the mortgagor or other defendant personally liable for the mortgage debt, an execution cannot regularly issue prior to the filing and confirmation of the report of the officer making the sale.⁷⁷ Upon the coming in of the report of the referee, from which the amount of the deficiency is ascertained, it is not necessary to apply to the court for judgment against the mortgagor for such deficiency. The execution may be issued directly on the judgment of foreclosure.⁷⁸

An execution for the deficiency on a foreclosure should not, as a rule, be issued without special application to the court upon notice to the defendant.⁷⁹ The decree in foreclosure making a defendant personally liable for any deficiency, taken together with the referee's report of the amount of such deficiency, furnishes a *prima facie* case against such defendant;⁸⁰ but a defendant may resist an execution against him by showing objections which are not contradictory to the decree and which would operate to effect its satisfaction.⁸¹

⁷⁵ *Fletcher v. Holmes*, 25 Ind. 458.

⁷⁶ *Cormerais v. Genella*, 22 Cal. 116. See *Rowe v. Table Mountain Water Co.* 10 Cal. 441; *Rollins v. Forbes*, 10 Cal. 299.

⁷⁷ *Bank of Rochester v. Emerson*, 10 Paige Ch. (N. Y.) 115, 10 Paige Ch. (N. Y.) 359. See *Bache v. Doscher*, 41 N. Y. Supr. Ct. (9 J. & S.) 150; *Cobb v. Thornton*, 8 How. (N. Y.) Pr. 66; *Hanover Fire Ins. Co. v. Tomlinson*, 3 Hun (N. Y.) 630; *Tormcy v. Gerhart*,

41 Wis. 54; *Baird v. McConkey*, 20 Wis. 297.

⁷⁸ *Bicknell v. Byrnes*, 23 How. (N. Y.) Pr. 486, 490, *Moore v. Shaw*, 15 Hun (N. Y.) 428. See *Schuler v. Fowler*, 63 Kan. 98, 64 Pac. 1035.

⁷⁹ *McCrickett v. Wilson*, 50 Mich. 513; *Giles v. Green*, 42 Mich. 107; *Clapp v. Maxwell*, 13 Neb. 542.

⁸⁰ *Ransom v. Sutherland*, 46 Mich. 489.

⁸¹ *Ransom v. Sutherland*, 46 Mich. 489.

§ 757. Miscellaneous matters connected with judgments for deficiency.—Many matters intimately associated with judgments for deficiency, which would seem to belong to this chapter, have already been fully considered in an earlier part of the work on parties defendant personally liable for the mortgage debt.⁸² They are for that reason omitted here. Among such matters may be mentioned the remedies for collecting a deficiency against the estate of a decedent who was personally liable for the payment thereof;⁸³ the remedies against the heirs and devisees of such a decedent;⁸⁴ the liability of the estates of married women for the payment of deficiencies arising on their personal obligations for the payment of mortgage debts;⁸⁵ the history of the procedure for enforcing the collection of deficiencies;⁸⁶ and technical points connected with the complaint and the decree of sale.⁸⁷

⁸² See *ante*, chap. xxi.

⁸³ See *ante*, §§ 234-236, 258.

⁸⁴ See *ante*, §§ 235-236.

⁸⁵ See *ante*, §§ 230-233, 257.

⁸⁶ See *ante*, §§ 215-220.

⁸⁷ See *ante*, §§ 221-225.

CHAPTER XXX.

RECEIVER—PRACTICE ON APPOINTMENT.

NATURE AND OBJECT OF OFFICE—MODES OF APPOINTMENT—APPLICATION FOR
—WHAT MUST BE SHOWN—APPOINTMENT BY REFEREE—ORDER APPOINTING—
RIGHTS, POWERS, DUTIES.

- § 758. Introductory—Right of mortgagor to rents and profits.
- § 759. Nature of office of receiver.
- § 760. Object of office of receiver.
- § 761. Appointment of receiver.
- § 762. When receiver will be appointed—*Prima facie* case.
- § 763. Rules for the appointment of a receiver.
- § 764. Modes of appointment.
- § 765. Jurisdiction of the court to appoint a receiver.
- § 766. Doctrine in various states.
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- § 768. Manner of appointing receiver—Motion or petition.
- § 769. Appointment of receiver by the court.
- § 770. On what papers application for receiver made.
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- § 778. Order of appointment by referee.
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- § 780. Contents of order appointing receiver—Powers defined—Property described.
- § 781. Proposal of names for receiver.
- § 782. Ineligibility to be appointed a receiver.
- § 783. From what time a receiver considered as appointed.
- § 784. Bond of receiver.
- § 785. Effect of appointment of receiver.
- § 786. Jurisdiction of receiver.
- § 787. Nature of receiver's possession.
- § 788. Rights and powers of receivers.

§ 789. Rights and duties of receivers.

§ 790. Rents bound from date of appointment of receiver.

§ 791. Personal liability of receivers.

§ 758. Introductory—Right of mortgagor to rents and profits.—In those states where the right of entry by the mortgagee has been abolished by statute, the mortgagor is entitled, both in law and in equity, to the complete enjoyment of the mortgaged premises, and of the rents and profits thereof, unless such rents and profits have been pledged, by an express stipulation in the mortgage, for the payment of the debt.^{87a} And where no proceedings are instituted for the appointment of a receiver to take charge of the rents and profits, the right of the mortgagor to receive them will continue until it is divested by a foreclosure and sale, and even after a sale, until the purchaser becomes entitled to the possession of the premises under the referee's deed;⁸⁸ Such right will be terminated only upon producing to the occupant of the premises the deed of the referee or other officer conducting the sale.⁸⁹

But, in all cases where the security is insufficient, and the mortgagor, or other party who is personally liable for the payment of the debt, is insolvent, the mortgagee may have a receiver appointed to take charge of the mortgaged premises

^{87a} *Syracuse City Bank v. Tallman*, 31 Barb. (N. Y.) 201, 208; *Zciter v. Bozeman*, 6 Barb. (N. Y.) 133, 139; *Ensign v. Colburn*, 11 Paige Ch. (N. Y.) 503; *Howell v. Ripley*, 10 Paige Ch. (N. Y.) 43; *Bank of Ogdensburg v. Arnold*, 5 Paige Ch. (N. Y.) 38, 41. See *ante*, § 718.

⁸⁸ See *Argall v. Pitts*, 78 N. Y. 239; *Mitchell v. Bartlett*, 51 N. Y. 447; *Cheney v. Woodruff*, 45 N. Y. 98, 101; *Whalin v. White*, 25 N. Y. 462, 465; *Giles v. Comstock*, 4 N. Y. 270, 275, 53 Am. Dec. 347; *Miner*

v. Beekman, 11 Abb. (N. Y.) Pr. N. S. 147, 152, 42 How. (N. Y.) Pr. 33, 37; 33 N. Y. Supr. Ct. (1 J. & S.) 67, 77; *Peck v. Knickerbocker Ice Co.* 18 Hun (N. Y.) 183, 186; *Astor v. Turner*, 11 Paige Ch. (N. Y.) 436, 43 Am. Dec. 766; *Howell v. Ripley*, 10 Paige Ch. (N. Y.) 43; *Clason v. Corley*, 5 Sandf. (N. Y.) 447; *Lofsky v. Maujer*, 3 Sandf. Ch. (N. Y.) 69.

⁸⁹ See N. Y. Supreme Court Rule 61; *Clason v. Corley*, 5 Sandf. (N. Y.) 447.

and of such of the rents and profits as have not yet been collected, unless the mortgagor or other person entitled to the possession gives security to account for the rents and profits, in case there is a deficiency.⁹⁰

§ 759. Nature of office of receiver.—A receiver is a disinterested person, as between the parties to a foreclosure, appointed to collect the rents, issues and profits of the mortgaged premises pending the suit,⁹¹ where it does not seem just and prudent to the court that any of the parties to the action should be permitted to collect them.⁹²

It is the duty of a receiver to take charge of the property pending the litigation; to preserve it from waste or destruction; to receive the rents and profits, and to dispose of them under the direction of the court.⁹³ He is simply to protect and care for the property or the fund entrusted to him,⁹⁴ and to make no disposition of it until directed by the court, from which alone he derives his authority.⁹⁵

He is a ministerial officer of the court,⁹⁶ and his term of

⁹⁰ *Syracuse City Bank v. Tallman*, 31 Barb. (N. Y.) 201; *Shotwell v. Smith*, 3 Edw. Ch. (N. Y.) 588; *Smith v. Tiffany*, 13 Hun (N. Y.) 671; *Astor v. Turner*, 11 Paige Ch. (N. Y.) 436, 43 Am. Dec. 766; *Howell v. Ripley*, 10 Paige Ch. (N. Y.) 43; *Sea Ins. Co. v. Stebbins*, 8 Paige Ch. (N. Y.) 565; *Main v. Ginthert*, 92 Ind. 180; *Connelly v. Dickson*, 76 Ind. 440; *Myers v. Estell*, 48 Miss. 373.

⁹¹ Where a court ordered money raised by attachment to be deposited with a designated banker, upon condition that he pay seven per centum interest thereon while in his hands, it was held that such banker was not a receiver. *Coleman v. Salisbury*, 52 Ga. 470.

⁹² *Chautauqua County Bank v.*

White, 6 Barb. (N. Y.) 589, 597; *Booth v. Clark*, 58 U. S. (17 How.) 323, 331, 15 L. ed. 164; Edw. on Rec. 2; Wyatt's Practice Reg. 355; Dan. Ch. Pr. 1552; 2 Barb. Ch. Pr. (2d ed.) 658.

⁹³ *Green v. Bostwick*, 1 Sandf. Ch. (N. Y.) 185; *Beverley v. Brooke*, 4 Gratt. (Va.) 187; *Booth v. Clark*, 58 U. S. (17 How.) 323, 331, 15 L. ed. 164.

⁹⁴ A receiver is not a trustee of an express trust. *Fichtenkamm v. Games*, 68 Mo. 289.

⁹⁵ *Lottimer v. Lord*, 4 E. D. Smith (N. Y.) 183.

⁹⁶ *Field v. Jones*, 11 Ga. 418; *Maguire v. Allen*, 1 Ball. & B. 75; *Bryan v. Cormick*, 1 Cox Ch. 422, 423; *Angel v. Smith*, 9 Ves. 335.

office continues only during the pendency of the suit, unless it is otherwise directed by the order appointing him.⁹⁷ He is the mere hand of the court in the management of the property or the fund.⁹⁸ His appointment is on behalf of all the parties to the action,⁹⁹ and not of the plaintiff or the defendant only;¹ and for the benefit of all who may establish an interest in the property.²

§ 760. Object of office of receiver.—The object of obtaining the appointment of a receiver is generally to gain a priority of lien on the rents and profits of the premises, so that the court will have the power of directing their application to the payment of the plaintiff's claim;³ a receiver cannot properly be appointed where the court does not have such power.⁴ The immediate and actual cause for the appointment of a receiver in a foreclosure, is to secure the rents and

⁹⁷ *Weems v. Lathrop*, 42 Tex. 207; *Meier v. Kansas Pac. Ry. Co.* 5 Dill. C. C. 476, 6 Rep. 642.

⁹⁸ *Richards v. Chesapeake & O. R. R. Co.* 1 Hughes C. C. 28; *Van-Rensselaer v. Emery*, 9 How. (N. Y.) Pr. 135.

⁹⁹ But he represents no interest of a stranger to the suit in which he was appointed. *Howell v. Ripley*, 10 Paige Ch. (N. Y.) 43.

¹ See *Davis v. Marlborough*, 2 Swans, 113, 125; *Hutchinson v. Massareene*, 2 Ball & B. 55. Junior mortgagees may, however, by superior diligence in having a receiver appointed, acquire a senior right to the rents and profits collected. See *Post v. Dorr*, 4 Edw. Ch. (N. Y.) 412; *Howell v. Ripley*, 10 Paige Ch. (N. Y.) 43; *Miltenberger v. Logansport R. R. Co.* 106 U. S. (16 Otto), 286, 27 L. ed. 117, 1 Sup. Ct. Rep. 140; *Thomas v. Brigstocke*, 4 Russ. Ch. 64.

² *Porter v. Williams*, 9 N. Y. 142, 59 Am. Dec. 519. See *Curtis v. Leavitt*, 15 N. Y. 9; *Gillet v. Moody*, 3 N. Y. 479; *Booth v. Clark*, 58 U. S. (17 How.) 323, 331, 15 L. ed. 164; *Davis v. Marlborough*, 2 Swans. 113, 125.

³ *Evans v. Coventry*, 3 Drew, 80; *Tullett v. Armstrong*, 1 Keen, 428; *Owen v. Homan*, 4 H. L. 1032.

⁴ *Howell v. Ripley*, 10 Paige Ch. (N. Y.) 43; *Evans v. Coventry*, 3 Drew. 80; *Wright v. Vernon*, 3 Drew. 121. Yet a receiver is sometimes appointed to take charge of property in which a stranger has an interest. *Vincent v. Parker*, 7 Paige Ch. (N. Y.) 65. In such a case the court, will, from time to time, make such orders as will protect the rights of the third party. *Vincent v. Parker*, 7 Paige Ch. (N. Y.) 65

profits of the mortgaged premises in advance of the final judgment, in order that they may be applied towards any deficiency that may exist between the amount of the incumbrances and the amount for which the property may sell under the foreclosure. Courts have no authority to interfere with the mortgagor's right to receive the rents and profits of the mortgaged property, unless such rents and profits, as well as the property, have been pledged as security for the debt,⁵ or unless the security is clearly insufficient.⁶

A receiver stands indifferent between the parties,⁷ and is in no sense accountable or subject to the control of any party to the suit;⁸ he is to be guided only by the order appointing him, and by the rules and practice of the court.⁹ As he represents all the parties, it is his duty to act in all things with a view to the equitable rights of all parties interested, and to protect the property and funds in his hands to the best of his ability.¹⁰

§ 761. Appointment of receiver.—The plaintiff in a foreclosure is entitled to the appointment of a receiver of the rents and profits of the mortgaged premises pending the suit,¹¹ where it is highly probable that the premises will not,

⁵ See *Syracuse City Bank v. Tallman*, 31 Barb. (N. Y.) 201, 208; *Zeiter v. Bowman*, 6 Barb. (N. Y.) 133, 139; *Ensign v. Colburn*, 11 Paige Ch. (N. Y.) 503; *Howell v. Ripley*, 10 Paige Ch. (N. Y.) 43; *Bank of Ogdensburg v. Arnold*, 5 Paige Ch. (N. Y.) 38, 41.

⁶ *Shotwell v. Smith*, 3 Edw. Ch. (N. Y.) 588; *Bank of Ogdensburg v. Arnold*, 5 Paige Ch. (N. Y.) 38; *Quincy v. Cheeseman*, 4 Sandf. Ch. (N. Y.) 405.

⁷ *Vermont & C. R. R. Co. v. Vermont Cent. R. R. Co.* 34 Vt. 1.

⁸ *Libby v. Rosekrans*, 55 Barb. (N. Y.) 202; *Musgrove v. Nash*, 3

Edw. Ch. (N. Y.) 172; *Lottimer v. Lord*, 4 E. D. Smith (N. Y.) 183; *Baker v. Backus*, 32 Ill. 79; *Booth v. Clark*, 58 U. S. (17 How.) 323, 331, 15 L. ed. 164.

⁹ *Musgrove v. Nash*, 3 Edw. Ch. (N. Y.) 172. See *Broad v. Wickham*, M. S. S. Case, cited in 1 Smith's Ch. Pr. 500; 1 VanSant Eq. Pr. 375.

¹⁰ *Iddings v. Bruen*, 4 Sandf. Ch. (N. Y.) 417; *Lottimer v. Lord*, 4 E. D. Smith (N. Y.) 183.

¹¹ In California the plaintiff formerly had no right to have a receiver of the rents and profits of the land appointed pending a fore-

upon a sale thereof under a decree of foreclosure, bring a sufficient sum to pay the debt and the costs of the suit, and the mortgagor, or other party who is personally liable for the debt, is insolvent.¹²

A receiver will be appointed only on the application of a person who has an acknowledged interest in the suit; ¹³ his appointment will continue during the pendency of the suit, unless his term of office is limited by the order appointing him.¹⁴

§ 762. When receiver will be appointed—*Prima facie* case.—To entitle a mortgagee to the appointment of a receiver, it must appear that the mortgaged premises are an insufficient security for the debt, and that the mortgagor, or other party personally liable for the debt, is insolvent.¹⁵ A receiver should be appointed only where there is a real necessity for it.¹⁶ In an action by a mortgagor to redeem, a receiver will not be appointed as against the mortgagee in possession, as long as there is a balance due him on the mortgage debt, unless he is mismanaging the property.¹⁷

closure. *Guy v. Ide*, 6 Cal. 79, 65 Am. Dec. 490.

¹² *Astor v. Turner*, 2 Barb. (N. Y.) 444, 3 How. (N. Y.) Pr. 225; *Sea Ins. Co. v. Stebbins*, 8 Paige Ch. (N. Y.) 565, 2 Barb. Ch. Pr. (2d ed.) 293. See *ante*, § 758.

¹³ *Chase's Case*, 1 Bland. Ch. (Md.) 213, 17 Am. Dec. 277; *Williams v. Wilson*, 1 Bland. Ch. (Md.) 421.

¹⁴ *Weemes v. Lathrop*, 42 Tex. 207. See *ante*, § 759.

¹⁵ *Burlingame v. Parce*, 12 Hun (N. Y.) 148; *Frelinghuysen v. Colden*, 4 Paige Ch. (N. Y.) 204. Under the Michigan statute, Comp. L. §§ 62, 63, a mortgagee is excluded from possession until he acquires an absolute title. Whether

or not a clause in the mortgage, giving him possession in case of default, can be carried into effect in view of this provision, by appointing a receiver on foreclosure, it certainly cannot be done until after default, and it would even then be a matter of discretion. *Beecher v. Marq. & Pac. Rolling Mill Co.* 40 Mich. 307. See *post*, § 793.

¹⁶ *Quincy v. Cheeseman*, 4 Sandf. Ch. (N. Y.) 405; *McLean v. Presley*, 56 Ala. 211; *First Nat. Bank v. Gage*, 79 Ill. 207; *Callahan v. Shaw*, 19 Iowa, 188; *Oldham v. First Nat. Bank*, 84 N. C. 304; *Morrison v. Buckner*, Hempst. C. C. 442.

¹⁷ *Patten v. Accessory Transit Co.* 4 Abb. (N. Y.) Pr. 237; *Bol-*

Receivers in mortgage foreclosures are appointed with great caution,¹⁸ and it is only in clear cases that they will be appointed at all,¹⁹ as where the rights of a suitor are apparently well established and can be preserved, pending the suit, only by a receiver.²⁰

The right to the relief does not grow out of the legal relations of the parties, nor out of the stipulations in the mortgage, but out of equitable considerations alone. The appointment of a receiver in a mortgage foreclosure is not a matter of strict or absolute right, but is purely an equitable one, and is always addressed to the sound discretion of the court,²¹ to be governed by all the circumstances of the case.²² The plaintiff must always set forth a *prima facie* case,²³ and a probable right to the property which is the subject matter of the litigation or foreclosure.²⁴

les v. Duff, 35 How. (N. Y.) Pr. 481; *Boston, &c., R. R. Co. v. New York, &c. R. R. Co.* 12 R. I. 220; *Rowe v. Wood*, 2 Jac. & W. 553; *Berney v. Sewell*, 1 Jac. & W. 647; *Quarrell v. Beckford*, 13 Ves. 377.

¹⁸ *Warner v. Gouverneur*, 1 Barb. (N. Y.) 36; *Shotwell v. Smith*, 3 Edw. Ch. (N. Y.) 588; *Sea Ins. Co. v. Stebbins*, 8 Paige Ch. (N. Y.) 565; *Jenkins v. Hinman*, 5 Paige Ch. (N. Y.) 309; *Frelinghuysen v. Colden*, 4 Paige Ch. (N. Y.) 204.

¹⁹ *Hand v. Dexter*, 41 Ga. 454. See *Sales v. Lusk*, 60 Wis. 490.

²⁰ *Overton v. Memphis & L. R. R. Co.* 3 McCr. C. C. 436, 10 Fed. 866.

²¹ See *Rider v. Bagley*, 84 N. Y. 461; *Syracuse Bank v. Tallman*, 31 Barb. (N. Y.) 201; *The Orphan Asylum v. McCartee*, Hopk. Ch. (N. Y.) 429; *Verplank v. Caines*, 1 Johns. Ch. (N. Y.) 57; *Pullan v. Cincinnati & C. A. L. R. R. Co.* 4 Biss. C. C. 35; *Crane v. McCoy*, 1

Bond C. C. 422; *Vose v. Reed*, 1 Wood C. C. 647. See *Copper Hill Mining Co. v. Spencer*, 25 Cal. 11, 13; *West v. Chasten*, 12 Fla. 315, 332; *Benneson v. Bill*, 62 Ill. 408; *Connelly v. Dickson*, 76 Ind. 440; *Jacobs v. Gibson*, 9 Neb. 380; *Oakley v. Patterson Bank*, 2 N. J. Eq. (1 H. W. Green), 181; *Sloan v. Moore*, 37 Pa. St. 217; *Cone v. Paute*, 12 Heisk. (Tenn.) 506; *Sales v. Lusk*, 60 Wis. 490; *Milwaukee & M. R. R. Co. v. Soutter*, 69 U. S. (2 Wall.) 510, 17 L. ed. 900; *Owen v. Homan*, 3 Mac. & G. 378; *Skip v. Harwood*, 3 Atk. 564. See *post*, § 792.

²² Proof of the insolvency of the party personally liable for the payment of the mortgage debt is not always required. *Ponder v. Tate*, 96 Ind. 330.

²³ *Copper Hill Mining Co. v. Spencer*, 25 Cal. 16; *Owen v. Homan*, 3 Mac. & G. 378.

²⁴ *Saylor v. Mockbie*, 9 Iowa, 209.

An express provision in a mortgage to the effect that a receiver be appointed upon foreclosure is held to be void as against public policy,²⁵ and in the absence of sufficient causes otherwise authorizing the appointment of a receiver, effect will not be given to this stipulation in the mortgage.²⁶ But if sufficient other facts appear, a court may in the exercise of its discretion enforce the stipulation.²⁷ In Illinois, however, it is held that such a provision in a mortgage will be enforced on the theory that it is in effect an express application by the parties of the rents and profits to the mortgage security.²⁸

§ 763. Rules for the appointment of a receiver.—No positive and unvarying rule can be laid down as to when a court will or will not interfere by this kind of *interim* protection of the property.²⁹ Where the evidence on which the court is to act, is very clearly in favor of the plaintiff, there should be no hesitancy about interfering; but where the evidence is weak there will, of course, be more difficulty. The question is one of degree, and it is, therefore, impossible to state any precise and unvarying rules.³⁰

A receiver should not be appointed in any instance unless the plaintiff makes out a *prima facie* case, and unless it also

²⁵ *Couper v. Shirley*, 75 Fed. 168. (Oregon); *Baker as rec'r. etc. v. Varney*, 129 Cal. 564, 79 Am. St. Rep. 140, 62 Pac. 100.

²⁶ *Lyng v. Marcus*, 118 N. Y. Supp. 1056; *Garretson Investment Co. v. Arndt*, 144 Cal. 64, 77 Pac. 770; *Ætna Life Ins. Co. v. Broeker*, 166 Ind. 576, 77 N. E. 1092; *Jarvis as trustee etc. v. McQuaide*, 24 Misc. 17, 53 N. Y. Supp. 97; *Eidlitz, as ex'r. trustee etc. v. Lancaster*, 40 App. Div. 446, 59 N. Y. Supp. 54; *United States Life Ins. Co. v. Ettinger*, 32 Misc. 378, 66 N. Y. Supp. 1; *Graybill as trustee etc. v. Heylman*, 123 N. Y. Supp. 622; *Bank of Woodland v. Stephens as*

adm'r. etc. 144 Cal. 659, 79 Pac. 379; *Jarmulowsky v. Rosenbloom*, 125 App. Div. 542, 109 N. Y. Supp. 968.

²⁷ *Pizer v. Herzig*, 121 App. Div. 609, 106 N. Y. Supp. 370; *Fletcher as trustee etc. v. Krupp*, 35 App. Div. 586, 55 N. Y. Supp. 146. See *Browning v. Sire*, 33 Misc. 503, 68 N. Y. Supp. 375; *Baier v. Kelley*, 55 Misc. 368, 106 N. Y. Supp. 552.

²⁸ See *Ryan v. Illinois Trust & Savings Bank*, 199 Ill. 76, 64 N. E. 1085; *Townsend v. Wilson*, 155 Ill. App. 303.

²⁹ Kerr on Rec. 4.

³⁰ *Owen v. Homan*, 4 H. L. 1032; *Gray v. Chaplin*, 2 Russ. 145.

appears that the property is in danger of being lost or materially injured before the final judgment is entered in the action.³¹ In some cases, the propriety of appointing a receiver cannot be determined until the trial.³² As a general rule, a receiver will be appointed in every case where the interests of the parties seem to require it.³³

In no case of a mortgage foreclosure should a receiver be appointed, if it is clear that on a forced sale of the mortgaged property, it will bring an amount sufficient to pay the debt, costs and expenses of the suit;³⁴ nor in general, if the mortgagor, or other party personally liable for the payment of the debt, is solvent.³⁵ But an application should be denied on the merits only, and not on merely technical grounds.³⁶

The appointment of a receiver must in all cases be dispensed with, if the defendant, who is in possession of the premises, gives security to account for the rents and profits, in case there is a deficiency upon the sale under the decree of foreclosure.³⁷

In determining whether a receiver of the rents and profits of mortgaged premises shall be appointed, the court must deal with the cause as it appears from the pleadings and evidence and stands upon the record.³⁸ If the court is satisfied from

³¹ *Hamilton v. The Accessory Transit Co.* 3 Abb. (N. Y.) Pr. 255, 13 How. (N. Y.) Pr. 108. See *post*, § 797.

³² *Verplank v. Caines*, 1 Johns. Ch. (N. Y.) 57.

³³ *Crane v. McCoy*, 1 Bond. C. C. 422.

³⁴ *Shotwell v. Smith*, 3 Edw. Ch. (N. Y.) 588; *Burlingame v. Parce*, 12 Hun (N. Y.) 144; *Pullan v. Cincinnati & C. A. L. R. R. Co.* 4 Biss. C. C. 35.

³⁵ *Syracuse City Bank v. Tallman*, 31 Barb. (N. Y.) 201; *Jenkins v. Hinman*, 5 Paige Ch. (N. Y.) 309.

³⁶ *Patten v. Accessory Transit Co.* 4 Abb. (N. Y.) Pr. 235; *Evans v. Coventry*, 5 DeG. M. & G. 911, 31 Eng. L. & Eq. 436.

³⁷ *Sea Ins. Co. v. Stebbins*, 8 Paige Ch. (N. Y.) 565; *Bank of Ogdensburg v. Arnold*, 5 Paige Ch. (N. Y.) 38; *Frelinghuysen v. Colden*, 4 Paige Ch. (N. Y.) 204. See *post*, § 801.

³⁸ *Silver v. Norwich*, 3 Swans. 112 n; *Skinner's Society v. Irish Society*, 1 M. & C. 164; *Evans v. Coventry*, 5 DeG. M. & G. 911, 918, 31 Eng. L. & Eq. 436.

the evidence before it, that it is necessary or expedient to preserve the property and to accumulate the rents, issues and profits thereof until the trial, a case will be made out for the appointment of a receiver.³⁹

§ 764. **Modes of appointment.**—The appointment of a receiver may be made in either of three ways: (1) He may be appointed by an order made directly by the court on a motion for a receiver, by naming the person to be receiver, prescribing the amount of his bond and the number of his sureties, and stating his duties in general terms; or, if the decision of the court is reserved on the argument of the motion, and is filed subsequently, then, by giving a brief general direction in the decision as to the form of the order, naming the receiver in blank, to be filled in by the judge himself, if the parties do not agree upon a receiver on notice of settlement;⁴⁰ (2) the appointment of a receiver may also be made on the confirmation of the report of a referee⁴¹ appointed by the court to hear the application and to report a proper person;⁴² (3) it may be made by a referee authorized by the court to appoint a receiver.⁴³ The latter was formerly the more usual course and practice.⁴⁴

§ 765. **Jurisdiction of the court to appoint a receiver.**—A court has no jurisdiction to appoint a receiver except in

³⁹ *Hugonin v. Basely*, 13 Ves. 107; *Davis v. Marlborough*, 2 Swans. 138; *Owen v. Homan*, 3 Mac. & G. 412, 4 H. L. 1033; *Whitworth v. Whyddon*, 2 Mac. & G. 55; *Glegg v. Fishwick*, 1 Mac. & G. 299; *Meyer v. Thomas*, 131 Ala. 111, 30 So. 89.

⁴⁰ 1 VanSant. Eq. Pr. 405.

⁴¹ The referee is a substitute in New York for the former master in chancery. *Wetter v. Schlieper*, 7 Abb. (N. Y.) Pr. 92.

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⁴² *Attorney-General v. Bank of Columbia*, 1 Paige Ch. (N. Y.) 511, 2 Barb. Ch. Pr. (2d ed.) 311, 312.

⁴³ The selection and appointment of a receiver, and the taking of security from him, are proper matters of reference under the Code, as they were under the former practice in chancery. *Wetter v. Schlieper*, 7 Abb. (N. Y.) Pr. 92.

⁴⁴ 2 Wait Pr. 230.

an action which is pending,⁴⁵ unless, perhaps, in a case where the defendant designedly avoids service of the process.⁴⁶ A judge has no power in vacation to appoint a receiver;⁴⁷ neither has a clerk of the court power to approve a receiver's bond in vacation.⁴⁸ A court commissioner has no jurisdiction to appoint a receiver.⁴⁹ Neither should a receiver be appointed by a judge in chambers. The appointment must, in all cases, be made by the court.⁵⁰

Where property has been lawfully placed under the custody and control of a receiver by a court having authority to appoint him, no other court will have any right to interfere with such receiver, unless it is some court which has a direct supervisory control over the court under whose process the receiver first took possession, or which has a superior jurisdiction in the premises.⁵¹ Where a state court, with full jurisdiction, has properly appointed a receiver and he is in possession of the property, a federal court will have no such superior jurisdiction or supervisory power as to warrant its interference with such receiver's custody and control of the property;⁵² and, consequently, a United States court will not appoint a receiver to take possession of property already

⁴⁵ *Hardy v. McClellan*, 53 Miss. 507; *Anon*, 1 Atk. 489; *Wyatt's Prac. Reg.* 356.

⁴⁶ *Sandford v. Sinclair*, 3 Edw. Ch. (N. Y.) 393; *Quinn v. Gunn*, 1 Hogan, 75.

⁴⁷ *Newman v. Hammond*, 46 Ind. 119. It was said by the supreme court of the United States in the case of *Hammock v. Loan & Trust Co.* 105 U. S. (15 Otto), 77, 26 L. ed. 1111, that a judge of a circuit court of Illinois cannot appoint a receiver in vacation.

⁴⁸ *Newman v. Hammond*, 46 Ind. 119.

⁴⁹ *Quiggle v. Trumbo*, 56 Cal. 626

⁵⁰ *Ireland v. Nichols*, 7 Robt. (N. Y.) 476, 37 How. (N. Y.) Pr. 22.

⁵¹ *Buck v. Colbath*, 70 U. S. (3 Wall.) 334, 18 L. ed. 257. See *Freeman v. Howe*, 65 U. S. (24 How.) 450, 16 L. ed. 749; *Taylor v. Carryl*, 61 U. S. (20 How.) 583, 594-597, 15 L. ed. 1028; *Peale v. Phipps*, 55 U. S. (14 How.) 368, 374, 14 L. ed. 459; *Wiswall v. Sampson*, 55 U. S. (14 How.) 52, 66, 14 L. ed. 322; *Williams v. Benedict*, 48 U. S. (8 How.) 107, 112, 12 L. ed. 1007; *Peck v. Jenness*, 48 U. S. (7 How.) 612, 625, 12 L. ed. 841; *In re Clark*, 4 Ben. D. C. 88, 97-98.

⁵² *Davis v. Alabama & F. R. R.*

ordered to be delivered to a receiver appointed by a state court.⁵³

A receiver appointed by a state court over mortgaged premises in an action for foreclosure, cannot be dispossessed or interfered with by an assignee in bankruptcy, subsequently appointed in a federal court over the mortgagor's estate,⁵⁴ without first liquidating the debt, the possession of the receiver being regarded as the possession of the mortgagee.⁵⁵

§ 766. Doctrine in various states.—In California, a receiver may be appointed by the court in which the action is pending, or by a judge thereof;⁵⁶ but a county judge cannot appoint a receiver in a case pending in a district court.⁵⁷ It is said that under the Connecticut Act of 1867, the judge should first make an express finding, that it is just and reasonable that a receiver should be appointed.⁵⁸ Under the constitution and laws of Florida, a receiver cannot be appointed by the judge of one circuit to take possession of property in another circuit.⁵⁹ The powers of the courts of Indiana in appointing receivers, are the same under the Code as under the general rules of equity, and the power will be exercised for the same purposes and in the same emergencies.⁶⁰

In Kentucky, in cases specified in the Code of Practice, a receiver may be appointed by the court.⁶¹ In Michigan, a court of equity cannot appoint a receiver except in cases where such appointment is allowed by the compiled laws of the state;⁶² there is no statute authorizing such a court to make

Co. 1 Woods C. C. 661; *In re Clark*, 4 Ben. D. C. 88; *Alden v. Boston H. & E. R. R. Co.* 5 Bankr. Reg. 230. But see contra, *In re Merchants' Ins. Co.* 3 Biss. C. C. 162.

⁵³ *Blake v. Alabama & C. R. R. Co.* 6 Bankr. Reg. 331.

⁵⁴ *Davis v. Alabama & F. R. R. Co.* 1 Woods C. C. 661.

⁵⁵ *Marshall v. Knox*, 83 U. S. (16 Wall.) 551, 21 L. ed. 481.

⁵⁶ Cal. Prac. Act, § 651.

⁵⁷ *Ruthrauff v. Kresz*, 13 Cal. 639.

⁵⁸ *Bostwick v. Isbell*, 41 Conn. 305.

⁵⁹ *State v. Jacksonville, P. & M. R. R. Co.* 15 Fla. 201.

⁶⁰ *Bitting v. TenEyck*, 85 Ind. 357.

⁶¹ Kentucky Civil Code, § 328.

⁶² Mich. Comp. L. § 5070.

an *ex parte* order appointing a receiver to take possession of real estate under a foreclosure, even though the parties themselves agree upon a receiver under the terms of the mortgage.⁶³ Under the Mississippi Code of 1880, a circuit judge has no power to appoint a receiver in a case pending in the chancery court, either in vacation or during a term.⁶⁴ The circuit court of Missouri has power to appoint a receiver in the mortgage foreclosure.⁶⁵ And in Nebraska a district judge has jurisdiction to appoint a receiver.⁶⁶

§ 767. Appointment of receiver by federal court.—A state court has no jurisdiction to appoint a receiver in an action to foreclose a mortgage, where the premises were, at the time of the commencement of the action, in the hands of a receiver appointed by a federal court having jurisdiction to make such appointment; and the fact that the lien which the receiver was appointed to enforce, is prior or subsequent to the one sought to be enforced in the state court, will not in any way affect the rule.⁶⁷

A court of chancery should not appoint a receiver pending a demurrer to its jurisdiction;⁶⁸ nor if the foreclosure is being defended on probable grounds.⁶⁹ But in order to guard against the abuse of dilatory pleas, or any irreparable mischief, the court may order an immediate trial of the action.⁷⁰

§ 768. Manner of appointing receiver—Motion or petition.—In an action to foreclose a mortgage a receiver may be appointed on either a motion or a petition. The appli-

⁶³ *Hazeltine v. Granger*, 44 Mich. 503.

⁶⁴ *Alexander v. Manning*, 58 Miss. 634.

⁶⁵ *Tuttle, as assignee, etc. v. Blow*, 163 Mo. 625, 63 S. W. 839.

⁶⁶ *Morris v. Linton*, 62 Neb. 731, 87 N. W. 958.

⁶⁷ *Milwaukee & St. P. R. R. Co.*

v. Milwaukee & M. R. R. Co. 20 Wis. 165, 88 Am. Dec. 735.

⁶⁸ *Ewing v. Blight*, 3 Wall. Jr. C. C. 139.

⁶⁹ *Shepherd v. Murdock*, 2 Molloy, 531; *Darcy v. Blake*, 1 Molloy, 247.

⁷⁰ *Ewing v. Blight*, 3 Wall. Jr. C. C. 139.

cation may be heard on affidavits or on oral testimony, and the appointment will be very much in the discretion of the court.⁷¹ The court may also appoint a receiver upon its own motion in a case requiring it.⁷²

The motion for the appointment of a receiver may be made on petition, if there should be occasion for such appointment before the complaint is actually served;⁷³ the hearing on such petition may be held in chambers.⁷⁴ Under the New York practice, the motion for a receiver must be made at a special term of the court,⁷⁵ in the county in which the action is triable,⁷⁶ and by a plaintiff in the action, a motion by a defendant being irregular,⁷⁷ except, perhaps, where a cross-complaint is filed and made the basis of the motion.⁷⁸

The duty of the court upon a motion for a receiver in a mortgage foreclosure, is merely to protect the property and to accumulate the rents, issues and profits until the determination of the suit.⁷⁹ It has long been the practice on a motion for a receiver in such cases not to look at junior mortgagees farther than to see that their rights are protected.⁸⁰ The court will not, on such a motion, encourage any attempt to obtain an intimation of its decision on questions involved in the merits of the action.⁸¹ The court is bound to express an opinion only so far as may be necessary to show the grounds on which the motion for a receiver is decided;⁸² it is the duty of the court to confine itself strictly to the appointment of a receiver, and not to go into the merits of the case.⁸³

⁷¹ *Hursh v. Hursh*, 99 Ind. 500.

⁷² *O'Mahoney v. Belmont*, 62 N. Y. 133.

⁷³ *VanSant*, Eq. Pr. 402.

⁷⁴ *Kilgore v. Hair*, 19 S. C. 486.

⁷⁵ 2 Barb. Ch. Pr. (2d ed.) 309, n 15.

⁷⁶ *Knickerbocker Trust Co. v. Oneonta, C. & R. S. Ry. Co.* 41 Misc. 204, 83 N. Y. Supp. 930.

⁷⁷ *Robinson v. Hadley*, 11 Beav. 614.

⁷⁸ *Waters v. Taylor*, 15 Ves. 10,

1 *VanSant*. Eq. Pr. 402. See *post*, § 807.

⁷⁹ *Blackeney v. Dufaur*, 15 Beav. 42.

⁸⁰ *Norway v. Rowe*, 19 Ves. 153; *Price v. Williams*, Coop. Ch. 31; *Brooks v. Greathed*, 1 Jac. & W. 176.

⁸¹ *Bates v. Brothers*, 2 Sm. & G. 509.

⁸² *Kerr on Rec.* 6, 7.

⁸³ *Skinner's Company v. Irish Society*, 1 Myl. & Cr. 164; *Evans v.*

§ 769. Appointment of receiver by the court.—The power to appoint a receiver of the rents and profits of mortgaged premises accruing pending a foreclosure, was inherent in the court of chancery before the adoption of the New York Code of Procedure. It was continued by that Code,⁸⁴ and has been re-enacted by the provisions of the Code of Civil Procedure,⁸⁵ defining cases in which receivers may be appointed.⁸⁶

Courts of equity have power to appoint receivers in mortgage foreclosures and to authorize them to take possession of the mortgaged property,⁸⁷ whether it is in the personal possession of the defendant or of his agents or tenants.⁸⁸ The appointment of a receiver is an ordinary exercise of appropriate chancery powers;⁸⁹ and there are very few cases in which a court of equity will not have power to interfere by appointing a receiver.⁹⁰

This jurisdiction has been assumed by the court of chancery for the advancement of justice, and is founded on the inadequacy of the remedies afforded by courts of ordinary jurisdiction;⁹¹ and on the showing of a proper case the court will *ex debito justitiæ* appoint a receiver.⁹²

Coventry, 5 D. M. & G. 918; *Blake-ney v. Dufaur*, 15 Beav. 42.

⁸⁴ § 244.

⁸⁵ § 713.

⁸⁶ See *Hollenbeck v. Donnell*, 94 N. Y. 342; *Latimer v. Moore*, 4 McL. C. C. 110.

⁸⁷ A court may appoint a receiver on its own motion in cases requiring it. *O'Mahoney v. Belmont*, 62 N. Y. 133.

⁸⁸ Where the property is in the possession of a tenant under a lease, such tenant must be made a party to the action, or he will not be affected by nor be subject to the order appointing the receiver. See *ante*, § 177.

⁸⁹ Courts of equity have power

to appoint receivers for the purpose of protecting and securing the property which is the subject of litigation. *Battle v. Davis*, 66 N. C. 252. See *Bank of Mississippi v. Duncan*, 52 Miss. 740; *The Wharf Case*, 3 Bland Ch. (Md.) 361; *Williamson v. Wilson*, 1 Bland Ch. (Md.) 418, 421.

⁹⁰ See *Bainbrigge v. Baddeley*, 3 Mac. & G. 419.

⁹¹ *Skip v. Harwood*, 3 Atk. 564; *Stitwell v. Williams*, 6 Madd. 49; *Davis v. Marlborough*, 2 Swanst. 165; Mitf. Pl. 145.

⁹² *Hopkins v. Canal Proprietors*, L. R. 6 Eq. 447. See *Williamson v. Wilson*, 1 Bland Ch. (Md.) 420; *Cupit v. Jackson*, 13 Price 721, 734.

§ 770. On what papers application for receiver made.—

A motion for the appointment of a receiver is generally made on the complaint of the plaintiff; but it may be made on affidavits before the complaint is served, when the plaintiff can clearly satisfy the court that he has an equitable claim to the property, and that a receiver is necessary to preserve it from loss.⁹³ When affidavits are used, they should show such facts and circumstances as may be necessary to sustain the appointment; copies of such affidavits should be served with the notice of motion.⁹⁴ If the plaintiff uses affidavits, the defendant may read counter depositions.⁹⁵

§ 771. Notice of application for receiver.—As a rule, a court of equity will have no jurisdiction of a motion for the appointment of a receiver in a mortgage foreclosure, unless notice of such motion has been served upon all the parties adversely interested.⁹⁶ Instead of a notice of motion, an *ex parte* order to show cause may be obtained; copies of the papers intended to be used on the motion and of the order to show cause, should then be served on each of the defend-

⁹³ 2 Barb. Ch. Pr. (2d ed.) 309-310; *Metcalfe v. Pulvertoft*, 1 Ves. & B. 182; *Duckworth v. Trafford*, 18 Ves. 283.

⁹⁴ *Goodyear v. Betts*, 7 How. (N. Y.) Pr. 187; *Austin v. Chapman*, 11 N. Y. Leg. Obs. 103 Edw. on Rec. 77; 1 Van Sant. Eq. Pr. 402.

⁹⁵ Edw. on Rec. 66; 2 Barb. Ch. Pr. (2d ed.) 310.

⁹⁶ *Whitehead v. Wooten*, 43 Miss. 523; *Vause v. Wood*, 46 Miss. 120; *Belknap Savings Bank v. Lamar Land & Canal Co.* 28 Colo. 326, 64 Pac. 212, N. Y. Code, Civ. Proc. § 714; Compare *Hardy v. McClellan*, 53 Miss. 507. See *Jarmulowsky v. Rosenbloom*, 125 App. Div. 542, 109 N. Y. Supp. 968; *Coleman v. Goodman*, 37 Misc. 517, 75 N. Y. Supp.

973; *Dazian v. Meyer*, 66 App. Div. 575, 73 N. Y. Supp. 328. It is said in *Bostwick v. Isbell*, 41 Conn. 305, that the powers given to a receiver by the Connecticut Act of 1867, are so great that, if the act is to be construed as intending to authorize the appointment without notice, it should be held to be void and contrary to the principles of natural justice.

A receiver appointed in supplementary proceedings is not an adverse party upon whom notice need be served of the motion for the appointment of a receiver in a foreclosure action. *Grover v. McNeely*, 72 App. Div. 575, 76 N. Y. Supp. 559.

ants.⁹⁷ Where the complaint has not been served, and it is intended to base the motion on that also, a copy thereof should be served with the notice of motion.⁹⁸

The notice of motion for the appointment of a receiver must be served like any other notice of motion,⁹⁹ by delivering copies thereof to all the necessary and interested parties.¹ The notice must express concisely, but clearly, the object of the application, for, as a general rule, the court will not extend the order beyond the scope of the notice.²

When no serious injury can result to the property involved in the controversy from the delay, notice of motion should always be given to adverse parties before a receiver is appointed;³ yet a receiver may be appointed without notice where the exigencies of the case require it.⁴ But a case of great urgency must be shown to justify an appointment made without notice.⁵ Where the mortgage expressly provides that a receiver may be appointed without notice, notice is not required.⁶

Where an order has been made permitting service by publication, the court may in its discretion, appoint a temporary receiver and preserve the property, without notice, or upon a notice given by publication or otherwise, as the court thinks proper.⁷

§ 772. Appointment of receiver on ex parte application.—It is the settled practice of the supreme court of New York, as it was of the late court of chancery, not to allow the appointment of a receiver *ex parte*, except in those cases where the defendant is without the jurisdiction of the

⁹⁷ 1 VanSant. Eq. Pr. 403.

⁹⁸ 1 VanSant. Eq. Pr. 403.

⁹⁹ 2 Barb. Ch. Pr. (2d ed.) 310.

¹ See *Baring v. Moore*, 5 Paige Ch. (N. Y.) 48, 521; *Buxton v. Monkhouse*, Coop. Ch. 41, 2 Barb. Ch. Pr. (2d ed.) 310.

² Edw. on Rec. 77.

³ *State v. Jacksonville, P. & M. R. Co.* 15 Fla. 201.

⁴ *Hardy v. McClellan*, 53 Miss. 507.

⁵ *State v. Jacksonville, P. & M. R. Co.* 15 Fla. 201.

⁶ N. Y. Code Civ. Proc. § 714.

⁷ N. Y. Code Civ. Proc. § 714.

court⁸ or cannot be found, having fraudulently hidden himself for the purpose of avoiding a personal service of the summons,⁹ or where, for some reason, it becomes absolutely necessary for the court to interfere before there is time to give notice to the adverse party, in order to prevent the destruction of, or a serious injury to the property,¹⁰ in which cases a receiver may be appointed *ex parte*.¹¹ Where it is proper to appoint a receiver *ex parte*, the particular circumstances which render such a summary proceeding necessary, should be distinctly stated in the affidavits or in the petition on which the application is made.¹²

§ 773. What the application must show.—To authorize the appointment of a receiver, the complaint or affidavits must show a cause for it by stating the facts which make such appointment necessary.¹³ In the complaint, or in the petition for the appointment of a receiver in a mortgage foreclosure, the plaintiff must show that the premises are not of sufficient value to satisfy his debt and the costs of the suit, and that the mortgagor, or other party who is personally liable for the payment of the mortgage debt, is irresponsible and unable to pay an expected deficiency.¹⁴ If danger to

⁸ See *Fletcher as trustee, etc. v. Krupp*, 35 App. Div. 586, 55 N. Y. Supp. 146.

⁹ *Sandford v. Sinclair*, 8 Paige Ch. (N. Y.) 373, aff'g 3 Edw. Ch. (N. Y.) 393; *Gibson v. Martin*, 8 Paige Ch. (N. Y.) 481; *Verplank v. Mercantile Ins. Co.* 2 Paige Ch. (N. Y.) 438; *People v. Norton*, 1 Paige Ch. (N. Y.) 17.

¹⁰ *People v. Albany & S. R. R. Co.* 38 How. (N. Y.) Pr. 228, 57 Barb. (N. Y.) 204, 1 Lans. (N. Y.) 308, 7 Abb. (N. Y.) Pr. N. S. 265.

¹¹ *Gibson v. Martin*, 8 Paige Ch. (N. Y.) 481; *Sandford v. Sinclair*, 8 Paige Ch. (N. Y.) 373, 2 Barb. Ch. Pr. (2d ed.) 311. Some courts

hold that a judge in chambers, upon an *ex parte* application, may appoint a receiver. See *Real Estate Associates v. San Francisco Superior Court*, 60 Cal. 223.

¹² *Verplank v. Mercantile Ins. Co.* 2 Paige Ch. 438; *People v. Albany & S. R. R. Co.* 38 How. (N. Y.) Pr. 228, 57 Barb. (N. Y.) 204, 1 Lans. (N. Y.) 308, 7 Abb. (N. Y.) Pr. N. S. 265.

¹³ *Tomlinson v Ward*, 2 Conn. 396.

¹⁴ *Sea Ins. Co. v. Stebbins*, 8 Paige Ch. (N. Y.) 565; *Harris v. United States Savings Fund & Investment Co.* 146 Ind. 265, 45 N. E. 328.

the property is not alleged in the complaint, and no facts appear in the affidavits, showing the necessity or expediency of appointing a receiver, the application will be denied.¹⁵ The facts essential to the appointment of a receiver need not be pleaded in the complaint, but may be shown by affidavits.¹⁶

A receiver will not be appointed on a mere allegation that the mortgaged premises are not sufficient security for all "just incumbrances thereon."¹⁷ Neither will one be appointed on a general allegation that loss will ensue if a receiver is not appointed, unless a full statement of the facts is made.¹⁸ A mere allegation of danger to the property will not of itself be sufficient, if the court is satisfied that a loss is not probable.¹⁹ An application for a receiver pending an action for foreclosure, must show an actual interest in the property and that such interest is in danger of being lost, or other facts which would warrant the interference of the court.²⁰ An order appointing a receiver will not be granted where the party applying for it does not establish an apparent right to the property in litigation, and where it is neither alleged nor shown by the evidence that there is danger of waste or injury to the property, or loss of the rents and profits by reason of the insolvency of the adverse party in possession.²¹ The application must also show who is in possession, as a receiver cannot be appointed unless the person in possession of the mortgaged premises is a party to the suit.²² A demand

¹⁵ *Baker v. Backus*, 32 Ill. 79, 95; *Whitworth v. Whyddon*, 2 Mac. & G. 55; *Wright v. Vernon*, 3 Drew, 121; *Micklethwait v. Micklethwait* 1 D. & J. 530; *Bowker v. Henry*, 6 L. T. N. S. 43. See *Graybill v. Heylman*, 123 N. Y. Supp. 622.

¹⁶ *Commercial Sav. Bank v. Corbett*, 5 Sawy. C. C. 172.

¹⁷ *Warner v. Gouverneur's Ex'rs.* 1 Barb. (N. Y.) 36. See *Shotwell v. Smith*, 3 Edw. Ch. (N. Y.) 588.

¹⁸ *Hanna v. Hanna*, 89 N. C. 68.

¹⁹ *Whitworth v. Whyddon*, 2 M.

& G. 55. See *Sickles v. Canary*, 8 App. Div. 308, 40 N. Y. Supp. 948, 75 N. Y. St. Rep. 347.

²⁰ *Goodyear v. Betts*, 7 How. (N. Y.) Pr. 187. See *McCarthy v. Peake*, 9 Abb. (N. Y.) Pr. 164, 18 How. (N. Y.) Pr. 138; *Patten v. Access. Trans. Co.* 4 Abb. (N. Y.) Pr. 235, 13 How. (N. Y.) Pr. 502; *Hamilton v. Access. Trans. Co.* 3 Abb. (N. Y.) Pr. 255, 13 How. (N. Y.) Pr. 108.

²¹ *Twitty v. Logan*, 80 N. C. 69.

²² *Sea Ins. Co. v. Stebbins*, 8

in the complaint for the appointment of a receiver is not necessary.²³

The proceedings should be in such a state as to enable the judge to determine who is to receive the fund which the receiver may bring into court.²⁴ But if the court sees that there is a *prima facie* case upon the record for the appointment of a receiver, the fact that the record is not perfect in detail, and is not in the shape it should be, to enable the court to administer complete justice, will not of itself defeat the appointment, especially if the objection is merely a formal one that may be remedied by amendment.²⁵ Where the mortgage, by its terms, pledges the income, rents and profits of the mortgaged premises to the payment of the debt, the mortgagee need not conclusively establish a right to recover before he is entitled to ask for the appointment of a receiver. If he shows a probable right to recover, and that the debtor is insolvent, the appointment of a receiver will follow as a matter of course.²⁶

§ 774. Objections to appointment of receiver.—The objection that other persons are necessary parties to the suit is no bar to the appointment of a receiver. If such parties are necessary, they can be brought in afterwards.²⁷ Objections because of the misjoinder of parties or of the multifariousness of causes of action, are no answer to an application for a receiver, if sufficient grounds for the appointment of one are shown.²⁸

A mortgagor who has sold and conveyed the mortgaged premises subject to his mortgage, is not in a position to oppose

Paige Ch. (N. Y.) 565. See *post*, § 804.

²³ *Commercial Sav. Bank v. Corbett*, 5 Sawy. C. C. 172.

²⁴ *Gray v. Chaplin*, 2 Russ. 147.

²⁵ *Kerr on Rec.* 11.

²⁶ *DesMoines Gas Co. v. West*, 44 Iowa, 23.

²⁷ *Barclay v. Quicksilver Mining Co.* 9 Abb. (N. Y.) Pr. N. S. 283.

²⁸ *Evans v. Coventry*, 5 D. M. & G. 918; *Steele v. Cobham*, L. R. 1 Ch. App. 325; *Major v. Major*, 8 Jur. 797.

the appointment of a receiver.²⁹ Where the parties stipulate in a mortgage that a receiver may be appointed, an answer not positively sworn to will not constitute a sufficient objection to an appointment.³⁰ It was held in *Thompson v. Selby*,³¹ that where the original bill had been answered, the pendency of a plea to the amended bill was not a bar to a motion for the appointment of a receiver.

§ 775. Appointment of receiver by referee or master.—

The selection and appointment, or proposal for appointment, of a receiver and the taking of security from him, are proper matters for a reference under the New York Code of Civil Procedure, as they were under the former practice in chancery.³² In general practice the reference is usually made to a person residing in the same county as the defendant, in order to relieve him of unnecessary expenses in traveling;³³ but in mortgage foreclosures, the referee should reside in the county where the land, or a portion of it, is situated, and where the action is pending.

Whether the receiver is appointed directly by the court, or through the medium of a referee, it is the duty of the court to follow the rules and practice of the court of chancery in like cases, so far as they are consistent with the present course of procedure;³⁴ an appointment by a referee under the old practice will be void.³⁵ The order of reference should require the usual notice of hearing to be given to the adverse parties. If no notice is given, and the opposing parties voluntarily appear before the referee, such appearance will be a

²⁹ *The Wall Street Fire Ins. Co. v. Loud*, 20 How. (N. Y.) Pr. 95.

³⁰ *Knickerbocker Life Ins. Co. v. Hill*, 2 Hun (N. Y.) 680.

³¹ 12 Sim. 100.

³² *Wetter v. Schlieper*, 7 Abb. (N. Y.) Pr. 92

³³ *Bank of Monroe v. Keeler*, 9 Paige Ch. (N. Y.) 249.

³⁴ 2 Barb. Ch. Pr. (2d ed.) 311, n 19.

³⁵ *Wetter v. Schlieper*, 7 Abb. (N. Y.) Pr. 92.

waiver of all irregularities, and no objection can be taken to the proceedings.³⁶

§ 776. Report of referee or master.—The referee or master having made the appointment, or selected a proper person to be recommended to the court for appointment as receiver, according to the terms of the order of reference, should report the facts to the court.³⁷ The report of the referee or master on the appointment of a receiver cannot be excepted to and need not be confirmed.³⁸ The appointment of a receiver, being within the discretion of the referee or master,³⁹ to support an objection thereto and to induce the court to interfere with his appointment, substantial reasons for such objection must be presented,⁴⁰ for the court will not order the referee to review his decision except on special grounds.⁴¹

It is a well settled rule in New York, that a court will not disturb or set aside the appointment of a receiver by a referee, unless the person selected is legally disqualified, or his situation is such as to induce the court to believe that he will not properly attend to the interests of the parties.⁴² The court will not disturb the referee's or master's decision merely because an interested party may think that a better selection

³⁶ *Wetter v. Schlieper*, 7 Abb. (N. Y.) Pr. 92.

³⁷ 2 Barb. Ch. Pr. (2d ed.) 317.

³⁸ *In re Eagle Iron Works*, 8 Paige Ch. (N. Y.) 385; *Thomas v. Dawkin*, 1 Ves. Jr. 452, 3 Bro. C. C. 507; *Wilkins v. Williams*, 3 Ves. 588.

³⁹ *Thomas v. Dawkin*, 1 Ves. Jr. 452, 3 Bro. C. C. 507. See *Ben-neson v. Bill*, 62 Ill. 408.

⁴⁰ *Thomas v. Dawkin*, 1 Ves. Jr. 452, 3 Bro. C. C. 507; *Tharpe v. Tharpe*, 12 Ves. 317.

⁴¹ *In re Eagle Iron Works*, 8 Paige Ch. (N. Y.) 385; *Wetter v.*

Schlieper, 7 Abb. (N. Y.) Pr. 92; *Wynne v. Newborough*, 15 Ves. 283; *Bowersbank v. Collasseau*, 3 Ves. 164; *Thomas v. Dawkin*, 1 Ves. Jr. 452, 3 Bro. C. C. 507; *Tharpe v. Tharpe*, 12 Ves. 317.

⁴² *In re Eagle Iron Works*, 8 Paige Ch. (N. Y.) 385.

Mere relationship to one of the parties to the action is not of itself a sufficient ground for the removal of a receiver; at most, it is but a circumstance to be taken into consideration at the time of making the appointment. *Wetter v. Schlieper*, 7 Abb. (N. Y.) Pr. 92, 93.

could have been made from the several persons proposed.⁴³ If, however, the court should order the referee or master to review his decision, the parties may proceed *de novo* by proposing other persons for the receivership.⁴⁴

§ 777. Order of appointment on report of referee recommending proper person.—Where, upon an application to the court for the appointment of a receiver, a referee or master is ordered to report a suitable person to be appointed and to approve of the sureties to be offered by him, the appointment will not be complete until it is confirmed by a special order of the court.⁴⁵ The party procuring such an order of reference should give the adverse parties the usual notice to attend before the referee.⁴⁶ A voluntary appearance before the referee will, however, waive all irregularities in the notice.⁴⁷

If the party summoned fails to appear, the referee may proceed *ex parte*, and the proceedings will not be open to review, unless proper cause is shown and the costs of the proceedings are paid.⁴⁸

§ 778. Order of appointment by referee.—Where the order appointing a referee empowers him to appoint a receiver and to approve the requisite bond for him, the amount of which he has authority to fix, an order for the confirmation of the report will not be necessary.⁴⁹ In such cases the referee,

⁴³ *In re Eagle Iron Works*, 8 Paige Ch. (N. Y.) 385.

⁴⁴ Smith on Rec. 11, 2 Barb. Ch. Pr. (2d ed.) 318.

⁴⁵ *In re Eagle Iron Works*, 8 Paige Ch. (N. Y.) 385.

⁴⁶ *Wetter v. Schlieper*, 7 Abb. (N. Y.) Pr. 92.

⁴⁷ *Wetter v. Schlieper*, 7 Abb. (N. Y.) Pr. 92. See *Brasher v. Van Courtlandt*, 2 Johns. Ch. (N. Y.) 242; *Nichols v. Nichols*, 10 Wend.

560; *Parker v. Williams*, 4 Paige Ch. (N. Y.) 439; *Hart v. Small*, 4 Paige Ch. (N. Y.) 288; *Robinson v. Nash*, 1 Anst. 76.

⁴⁸ Edw. on Rec. 70, 1 VanSant. Eq. Pr. 408.

⁴⁹ *In re Eagle Iron Works*, 8 Paige Ch. (N. Y.) 385; *Bowersbank v. Collasseau*, 3 Ves. 164, 1 VanSant. Eq. Pr. 407, 2 Wait. Pr. 235.

after appointing the receiver and approving the sureties to be given by him, should file the required bond,⁵⁰ together with his report of the appointment, with the clerk of the court, stating in his report that he has approved and filed such bond.⁵¹ Upon the filing of such report, the appointment of the receiver will be complete, and he may immediately enter upon his duties.⁵²

A receiver takes title to the property from the time of his appointment.⁵³ As between the parties to the suit, he is to be considered appointed from the date of the order of reference.⁵⁴ Either party may have the appointment of a receiver by a referee reviewed on presenting a petition to the court, on notice to all the parties interested,⁵⁵ setting forth the grounds of objection and praying that the referee be directed to review his report.⁵⁶ The application to review the appointment of a referee may also be made by motion supported by affidavits.

The appointment of a receiver being within the discretion of the referee or master,⁵⁷ there must be a well-founded objection to support an exception thereto,⁵⁸ for the court will not order the referee to review his decision except for special reasons,⁵⁹ and the court will not interfere with the appoint-

⁵⁰ 1 VanSant. Eq. Pr. 407.

⁵¹ 2 Wait. Pr. 235.

⁵² *In re Eagle Iron Works*, 8 Paige Ch. (N. Y.) 385; *Wetter v. Schlieper*, 7 Abb. (N. Y.) Pr. 92; *Lottimer v. Lord*, 4 E. D. Smith (N. Y.) 183, 191, 2 Wait. Pr. 235.

⁵³ *Wilson v. Allen*, 6 Barb. (N. Y.) 543; *Lottimer v. Lord*, 4 E. D. Smith (N. Y.) 183, 191; *Rutter v. Tallis*, 5 Sandf. (N. Y.) 610.

⁵⁴ *Fairfield v. Weston*, 2 Sim. & S. 98.

⁵⁵ Objection to the referee's or master's report cannot be made by exceptions. *Tyler v. Simmons*, 6 Paige Ch. (N. Y.) 127; *Thomas v. Dawkin*, 1 Ves. Jr. 452, 3 Bro. C.

C. 507; *Wilkins v. Williams*, 3 Vas. 588.

⁵⁶ *In re Eagle Iron Works*, 8 Paige Ch. (N. Y.) 385.

⁵⁷ *Thomas v. Dawkins*, 1 Ves. Jr. 452, 3 Bro. C. C. 507. See *Bennesson v. Bill*, 62 Ill. 408.

⁵⁸ *Thomas v. Dawkin*, 1 Ves. Jr. 452, 3 Bro. C. C. 507; *Tharpe v. Tharpe*, 12 Ves. 317.

⁵⁹ *Wetter v. Schlieper*, 7 Abb. (N. Y.) Pr. 92; *In re Eagle Iron Works*, 8 Paige Ch. (N. Y.) 385; *Wynne v. Newborough*, 15 Ves. 283; *Tharpe v. Tharpe*, 12 Ves. 317; *Bowersbank v. Colasseau*, 3 Ves. 164; *Thomas v. Dawkin*, 1 Ves. Jr. 452

ment of a receiver by a referee unless a case is presented showing that the person appointed is disqualified,⁶⁰ or that his position is such as to induce a belief that he will not properly attend to the interests of the parties.⁶¹

§ 779. Order of appointment by court—Appeals.— When the appointment of a receiver is made by the court, the penalty of the bond should be fixed and the general terms of the order prescribed at the time it is granted.⁶² The form and contents of the order appointing a receiver must be determined by the court.⁶³ The judge may himself draw the order, prescribing all of its details, or he may allow the form of order submitted by the moving party.⁶⁴ When the order contains special provisions, it is customary for the attorney of the moving party to submit a copy of the proposed order to the attorney for the adverse party, and if any of its provisions are objectionable, to make an application to the judge in court or at chambers for a settlement of the terms of the order.⁶⁵ The attorney opposing the order may propose amendments to be submitted to the judge with the original form for settlement,⁶⁶ when the parties cannot otherwise agree.⁶⁷

The order,⁶⁸ as settled, should then be entered by the

⁶⁰ *Wetter v. Schlieper*, 7 Abb. (N. Y.) Pr. 92; *In re Eagle Iron Works*, 8 Paige Ch. (N. Y.) 385; *Wynne v. Newborough*, 15 Ves. 283.

⁶¹ *Wetter v. Schlieper*, 7 Abb. (N. Y.) Pr. 92; *In re Eagle Iron Works*, 8 Paige Ch. (N. Y.) 385; *Wynne v. Newborough*, 15 Ves. 283, 1 Barb. Ch. Pr. 674.

⁶² 2 Wait. Pr. 230.

⁶³ It is said to be the duty of the attorney, and not of the judge, to see that the order is proper. *LaFarge v. VanWagenen*, 14 How. (N. Y.) Pr. 54, 57. An order denying the appointment of a receiver in a foreclosure is not final.

Beecher v. Marquette & Pac. Rolling Mill Co. 40 Mich. 307.

⁶⁴ 1 VanSant. Eq. Pr. 406.

⁶⁵ If the terms of the order are settled out of court, and the order is allowed by the judge's indorsing his *allocatur* upon it, it must then be filed and entered. 1 VanSant. Eq. Pr. 406.

⁶⁶ Not to the clerk as formerly. *Whitney v. Belden*, 4 Paige Ch. (N. Y.) 140, 1 VanSant. Eq. Pr. 406.

⁶⁷ 1 VanSant. Eq. Pr. 406; 2 Wait. Pr. 230, § 5.

⁶⁸ Orders granted by a justice *ex parte* in chambers, under the New

moving party,⁶⁹ who is entitled to file it with the clerk of the court;⁷⁰ copies of the order should then be served on all the parties interested,⁷¹ because such parties may have a right to appeal, and the duration of such right will be limited only from the time of the service of a copy of the order with a notice of the entry thereof.⁷² It was held in *Farley v. Farley*,⁷³ that the moving party is not entitled to notice from the adverse party of the entering of such order, in order to limit his right of appeal therefrom; but it was decided in the more recent case of *Rankin v. Pine*,⁷⁴ that the service of a written notice is necessary, even when the appeal is taken from a judgment entered by the appellant himself.

An appeal must be taken within thirty days after the written notice of the entry of the order has been given to the party appealing.⁷⁵ The order will be considered as entered from the time of its delivery to the clerk for that purpose.⁷⁶ A notice of the entry of the order will not avail to limit the time of appeal, unless it is in writing,⁷⁷ and is such as to

York Code, need not be entered with the clerk. *Savage v. Relyea*, 3 How. (N. Y.) Pr. 276, 1 Code (N. Y.) 42.

⁶⁹ The order must be entered by the prevailing party with the clerk of the court where the papers are filed. *Savage v. Relyea*, 3 How. (N. Y.) Pr. 276, 1 N. Y. Code, 42. Should the successful party fail to enter the order within twenty-four hours after it is granted, the unsuccessful party may enter it; or any party affected by such order, is entitled to do so under the New York Code. Neither party can have any benefit from a decision of the court, until the order on such decision is drawn and entered. *Whitney v. Belden*, 4 Paige Ch. (N. Y.) 140; *Peet v. Cowenhoven*, 14 Abb. (N. Y.) Pr. 56.

⁷⁰ Edw. on Rec. 66.

⁷¹ *Whitney v. Belden*, 4 Paige Ch. (N. Y.) 140.

⁷² *Rankin v. Pine*, 4 Abb. (N. Y.) Pr. 309; *People ex rel. Backus v. Spalding*, 9 Paige Ch. 607; *Farley v. Farley*, 7 Paige Ch. (N. Y.) 40; *Tyler v. Simmons*, 6 Paige Ch. (N. Y.) 127; *Jenkins v. Wilde*, 14 Wend. (N. Y.) 539.

⁷³ 7 Paige Ch. (N. Y.) 40.

⁷⁴ 4 Abb. (N. Y.) Pr. 309.

⁷⁵ N. Y. Code Civ. Proc. § 1351.

⁷⁶ *Farley v. Farley*, 7 Paige Ch. (N. Y.) 40, 42.

⁷⁷ *People ex rel. Backus v. Spalding*, 9 Paige Ch. (N. Y.) 607; *Fry v. Bennett*, 7 Abb. (N. Y.) Pr. 352, 16 How. (N. Y.) Pr. 402, 406, 2 Bosw. (N. Y.) 684.

apprise the adverse party fully of the whole substance, if not of the very details of the order.⁷⁸

§ 780. Contents of order appointing receiver—Powers defined—Property described.—Where the application for a receiver has been made and allowed, care should be taken in drawing the order for his appointment that it fully defines his powers.⁷⁹ It should state distinctly on the face of it, over what property he is appointed,⁸⁰ or refer to the pleadings or some paper in the proceedings which describes the property, so that a party may know what the officer of the court is in possession of;⁸¹ otherwise, he cannot hold possession of the property.⁸² It sometimes happens that the court, although of the opinion that the moving party is entitled to a receiver, will not make such an appointment directly, but in the alternative requiring that the demand of the moving party be satisfied, or that a receiver be appointed.⁸³ The order for a receiver usually directs him to state his accounts from time to time, and to pay the balance found due from him into court to the credit of the action, to be there invested and accumulated, or otherwise disposed of, as the court may think proper.⁸⁴

If a receiver is appointed on behalf of several incumbrancers, the order generally contains a recital that the appointment is to be without prejudice to the rights of the prior incumbrancers of the estate, who may think proper to

⁷⁸ *Fry v. Bennett*, 7 Abb. (N. Y.) Pr. 352, 16 How. (N. Y.) Pr. 402, 406, 2 Bosw. (N. Y.) 684; *Champion v. Plymouth Congregational Church*, 42 Barb. (N. Y.) 441.

⁷⁹ Edw. on Rec. 66.

⁸⁰ *Crow v. Wood*, 13 Beav. 271; High on Rec. (2d ed.) 76, § 87.

⁸¹ *O'Mahoney v. Belmont*, 62 N. Y. 133; *Crow v. Wood*, 13 Beav.

271, 2 Barb. Ch. Pr. (N. Y.) 312; 1 VanSant. Eq. Pr. 405; High on Rec. (2d ed.) 76, § 87.

⁸² *O'Mahoney v. Belmont*, 62 N. Y. 133.

⁸³ *Curling v. Townsend*, 19 Ves. 628; High on Rec. (2d ed.) 82, § 102.

⁸⁴ 2 Dan. Ch. Pr. 1573.

take possession of the premises by virtue of their respective claims. The order usually directs that the receiver, out of the rents and profits to be collected by him, shall keep down the interest in such incumbrances, according to their priorities, and be allowed the same in passing his accounts.⁸⁵ If the mortgagor is in possession of the premises, the order should direct him to deliver the possession thereof to the receiver.⁸⁶

§ 781. Proposal of names for receiver.—The referee or master upon a reference to appoint a receiver should designate that person whom he deems, all things considered, best qualified for the office, without regard to the fact that he was proposed by one or the other of the parties;⁸⁷ under equal circumstances, the party obtaining the order for a receiver has, *prima facie*, a right to nominate the receiver.⁸⁸

In proceedings upon a reference for the appointment of a receiver, the party who has obtained the order should present to the referee a written proposal containing the names of the desired receiver and his sureties. If the person thus nominated is objectionable, however, another person may be nominated by any interested party by a counter-proposal.⁸⁹

⁸⁵ *Smith v. Effingham*, 2 Beav. 232; *Lewis v. Zouche*, 2 Sim. 388.

⁸⁶ *Griffith v. Thapwel*, 2 Vas. Sr. 401; *Everett v. Belding*, 22 L. J. Ch. 75. As to the form of the order, see *Davis v. Duke of Marlborough*, 2 Swans. 113, 116; *Baylies v. Baylies*, 1 Coll. 548.

⁸⁷ *Lespinasse v. Bell*, 2 Jac. & W. 436. The appointment of a receiver is usually a matter of discretion, but there are persons who are not competent to act owing to their peculiar relation to the parties. *Benneson v. Bill*, 62 Ill. 408. See *Thomas v. Dawkin*, 1 Ves. Jr. 452, 3 Bro. C. C. 508.

⁸⁸ *Smith* on Rec. 8, 2 Barb. Ch.

Pr. (2d ed.) 316; 1 VanSant. Eq. Pr. 407.

⁸⁹ A person not having an interest in the action cannot propose a receiver, and it is contrary to the orderly proceedings of a court of justice to allow a stranger to participate in the nominations for such an appointment. *O'Mahoney v. Belmont*, 62 N. Y. 133; *Attorney-General v. Day*, 2 Madd. 246; Edw. on Rec. 22, 2 Barb. Ch. Pr. (2d ed.) 316. Where the matter is referred to a referee with power to appoint a receiver, the appointment will be entirely within his discretion, and he need not give any reasons for his selection. *Benneson v. Bill*, 62

§ 782. **Ineligibility to be appointed a receiver.**—Although as a general rule the court will appoint as receiver a disinterested person and not a party to the foreclosure, yet a party to the action is not absolutely disqualified from acting as receiver. Indeed, there are cases in which a party to the suit, if otherwise unobjectionable, should be appointed in preference to any one else.⁹⁰ A non-resident should not be appointed a receiver.⁹¹ A master in chancery, whose duty it is to pass upon the accounts and to control the conduct of a receiver, is also disqualified from acting.⁹²

The New York judiciary Law⁹³ prohibits the appointment in New York and Kings counties of any person who holds the office of clerk, deputy clerk, special deputy clerk or assistant in the clerk's office, of a court of record or of the surrogate's court. And it has been held that usually a party to the suit is not competent to act as receiver, unless by the consent of all parties.⁹⁴ In Kansas⁹⁵ and Ohio⁹⁶ no party, or attorney, or person interested in an action can be appointed a receiver therein; and in Kentucky⁹⁷ there is the same prohibition with an exception in favor of executors, administrators, curators, guardians and committees of persons of unsound mind. Generally, a trustee to let and manage an estate should not be appointed a receiver of the same, whether he is sole trustee or acts jointly with others;⁹⁸ he should be appointed only when he will act without compensation. Neither is the next of kin of an infant complainant a proper party to be appointed a

Ill. 408; *Thomas v. Dawkin*, 1 Ves. Jr. 452, 3 Bro. C. C. 508.

⁹⁰ *Hubbard v. Guild*, 1 Duer. (N. Y.) 662; 1 VanSant. Eq. Pr. 400. But see *Benneson v. Bill*, 62 Ill. 408.

⁹¹ See *Meier v. Kansas Pac. Ry. Co.* 5 Dill. C. C. 476, 642.

⁹² *Benneson v. Bill*, 62 Ill. 408; *Kilgore v. Hair*, 19 S. C. (N. S.) 486; *Ex parte Fletcher*, 6 Ves. 427.

⁹³ N. Y. Code Civ. Proc. § 251.

⁹⁴ *Benneson v. Bill*, 62 Ill. 408. But see *Hubbard v. Guild*, 1 Duer (N. Y.) 662.

⁹⁵ Kansas Code, § 263.

⁹⁶ 2 Ohio Rev. Stat. § 5588.

⁹⁷ Ky. Civil Code, § 330.

⁹⁸ *Sutton v. Jones*, 15 Ves. 584; *Sykes v. Hastings*, 11 Ves. 363, 2 Barb. Ch. (N. Y.) Pr. (2d ed.) 305

receiver;⁹⁹ nor one who is a stranger to the court, if objected to by either party;¹ nor any person who, by his own act or position, stands in an interested relation to the cause. The law partner of the solicitor for the plaintiff in a foreclosure, cannot, even by consent, be appointed receiver.²

§ 783. From what time a receiver considered as appointed.—An order for a receiver vests the possession in him from the date of his appointment,³ without reference to the time of his giving bonds.⁴ And upon the appointment of a receiver, the title to the property, of which he is made receiver, vests in him in trust, though further proceedings may be necessary to acquire the actual possession of it.⁵ But a court cannot take property out of the hands of a creditor until his claim is satisfied.⁶

When an order of reference is made for the appointment of a receiver, his title vests in and attaches to the property by relation, from the date of the order of reference, with the same effect as if the order had named the receiver.⁷ Such an order is *per se* a sequestration of the property and gives all the necessary means for enforcing the receiver's rights.⁸

Where the court directs a reference to select a proper

⁹⁹ *Stone v. Wishart*, 2 Madd. 64.

¹ *Smith v. New York Consolidated State Co.* 28 How. (N. Y.) Pr. 208, 18 Abb. (N. Y.) Pr. 419.

² *Merchants' and Manufacturers' Bank v. Kent*, Circuit Judge, 43 Mich. 292.

³ *Wilson v. Allen*, 6 Barb. (N. Y.) 542; *Wilson v. Wilson*, 1 Barb. Ch. (N. Y.) 592. See *Porter v. Williams*, 9 N. Y. 142; 59 Am. Dec. 519; *sub nom. Porter v. Clark*, 12 How. (N. Y.) Pr. 107; *West v. Fraser*, 5 Sandf. (N. Y.) 653; *Albany City Bank v. Schermerhorn*, Clarke Ch. (N. Y.) 297, 300; *Van Wyck v. Bradley*, 3 N. Y. Code, 157

⁴ *Maynard v. Bond*, 67 Mo. 315.

⁵ *Olney v. Tanner*, 19 Bankr. Reg. 178.

⁶ *Benedict v. Maynard*, 5 McL. C. C. 262.

⁷ *Rutter v. Tallis*, 5 Sandf. (N. Y.) 610. See *Deming v. New York Marble Co.* 12 Abb. (N. Y.) Pr. 66; *In re North American Gutta Percha Co.* 17 How. (N. Y.) Pr. 549, 9 Abb. (N. Y.) Pr. 79; *Lottimer v. Lord*, 4 E. D. Smith (N. Y.) 183.

⁸ See *Porter v. Williams*, 9 N. Y. 142, 59 Am. Dec. 519.

person to be appointed receiver, the appointment will not be complete until it is confirmed by a special order of the court;⁹ but where the referee or master is directed to appoint a receiver and to take the requisite security from him, an order confirming the appointment will not be necessary.¹⁰

§ 784. **Bond of receiver.**—Except in those cases where the sheriff of the county is appointed to act as receiver in a mortgage foreclosure, the receiver should be required to give proper bonds for the faithful performance of his duties.¹¹ The bond must be properly executed, approved¹² and filed with the clerk of the court which appointed the receiver.¹³ After executing and filing his bond he may immediately enter upon the discharge of his duties.¹⁴

The sureties of the receiver must reside within the jurisdiction of the court,¹⁵ and be real and substantial persons

⁹ *In re Eagle Iron Works*, 8 Paige Ch. (N. Y.) 385.

¹⁰ 2 Barb. Ch. Pr. (2d ed.) 317.

¹¹ *Grantham v. Lucas*, 15 W. Va. 425, 432. See *Willis v. Corlies*, 2 Edw. Ch. (N. Y.) 281; *Verplank v. Caines*, 1 Johns. Ch. (N. Y.) 57; *Sea Ins. Co. v. Stebbins*, 8 Paige Ch. (N. Y.) 565; *Quincy v. Cheeseman*, 4 Sandf. Ch. (N. Y.) 405; *Smith v. Butcher*, 28 Gratt. (Va.) 144. By the provisions of the Kentucky Civil Code, § 331, and the Ohio Rev. St. § 5589, a receiver, before entering upon the discharge of his duties, must be sworn to perform them faithfully, and, with one or more sureties to be approved by the court, execute a bond to such person, and in such sum as the court shall direct, conditioned that he will faithfully discharge the duties of receiver in the action and obey the orders of the court therein.

¹² The Maryland Statute, 2 Md. Code Pub. L. 28, 29, requiring the bond of a receiver to be approved by the court, but not making such approval a condition precedent, is directory only; an approval *nunc pro tunc* will be valid. *Gephart v. Starrett*, 47 Md. 396. A court commissioner has no jurisdiction to appoint a receiver, and a bond given by a receiver so appointed and approved by such commissioner, is void. *Quiggle v. Trumbo*, 56 Cal. 626.

¹³ Where a bond given by a receiver upon his appointment is not filed with the proper officer, the court may direct it to be filed *nunc pro tunc*. *Whiteside v. Prendergast*, 2 Barb. Ch. (N. Y.) 471; *Carper v. Hawkins*, 8 W. Va. 291.

¹⁴ See *In re Eagle Iron Works*, 8 Paige Ch. (N. Y.) 385.

¹⁵ *Cockburn v. Raphall*, 2 Sim. & S. 453.

capable of contracting.¹⁶ If the sureties proposed are not satisfactory to the court, the receiver can present the names of other sureties in an amended proposal, stating them to be in place of those formerly proposed.¹⁷ Should the court at any time regard the sureties of a receiver as insufficient, it may require him to show cause why he should not give additional sureties upon his bond; upon his failure to show cause, he may be removed. And it must plainly appear that the court erred in so removing a receiver before an appellate court will reverse its action.¹⁸

§ 785. **Effect of appointment of receiver.**—The appointment of a receiver determines no rights.¹⁹ A court will not, on a motion to appoint a receiver, prejudge the case,²⁰ or give any intimation what its decision will be at the trial.²¹ While the appointment of a receiver operates, to a certain extent, as an injunction,²² yet the effect of the appointment of a receiver is very different from that of granting an injunction.²³

The effect of the appointment of a receiver is to remove the property from the possession of the person occupying or holding it.²⁴ Where a receiver has been appointed and an order is made for the delivery of the property to him, a demand therefor must be made by the receiver personally, for the party in possession is not bound to deliver the property to any one except the receiver. The plaintiff's attorney

¹⁶ *Smith v. Scandrett*, 1 W. Bl. 444; *Breadmore v. Phillips*, 4 Maule. & Sel. 173.

¹⁷ 2 Barb. Ch. Pr. (2d ed.) 316, Edw. on Rec. 74.

¹⁸ *Shackelford v. Shackelford*, 32 Gratt. (Va.) 481.

¹⁹ *In re Colvin*, 3 Md. Ch. Dec. 278, 302; *Chase's Case*, 1 Bland Ch. (Md.) 206, 213, 17 Am. Dec. 277; *Beverley v. Brooke*, 4 Gratt. (Va.) 187, 208.

²⁰ *Hugonin v. Basley*, 13 Ves. 107.

²¹ *Tripp v. Chard Ry. Co.* 11 Hare, 264.

²² *Evans v. Coventry*, 3 Drew, 82. An injunction is embodied more or less in every order appointing a receiver.

²³ See *Boyd v. Murray*, 3 Johns. Ch. (N. Y.) 48.

²⁴ *Payne v. Baxter*, 2 Tenn. Ch. 517.

cannot act, in this respect, for the receiver or as his attorney.²⁵

The appointment of a receiver has no retroactive effect to divest the accrued rights of third persons.²⁶ The rights of a receiver extend only to the possession of the land, to collecting the rents and profits, to making leases and to exercising other acts of control over the property, the legal title remaining in every respect as it was prior to the appointment of such receiver.²⁷ A receiver cannot be placed in possession of demised premises on the application of a party who not only is not entitled to the possession thereof, but who has no interest whatever in the property in question.²⁸

§ 786. Jurisdiction of receiver.—A receiver has no rights or powers except such as are conferred upon him by the order appointing him and by the practice of the courts;²⁹ and he cannot act in his official capacity beyond the jurisdiction of the court by which he was appointed.³⁰

An order appointing a receiver is *per se* a sequestration of the property, and gives all the necessary means of enforcing

²⁵ *Panton v. Zebley*, 19 How. (N. Y.) Pr. 394.

²⁶ *Favorite v. Deardorff*, 84 Ind. 555.

²⁷ *Foster v. Townshend*, 2 Abb. (N. Y.) N. C. 29, 34; *Attorney-General v. Coventry*, 1 P. Wm. 307; *Hyde v. Greenhill*, 1 Dick. 106; *Sutton v. Stone*, 1 Dick. 107. See *Neale v. Bealing*, 3 Swan, 304 n. c., *Jeremy Eq. Jurisd.* 252, 253.

²⁸ *Huerstel v. Lorillard*, 6 Robt. (N. Y.) 260.

²⁹ *Chatauqua County Bank v. White*, 6 Barb. (N. Y.) 589. See *Booth v. Clark*, 58 U. S. (17 How.) 322, 331, 15 L. ed. 164; *In re Eagle Iron Works*, 8 Paige Ch. (N. Y.) 385; *Verplank v. The Mercantile*

Ins. Co. 2 Paige Ch. (N. Y.) 438, 452; *Lottimer v. Lord*, 4 E. D. Smith (N. Y.) 183; *Bowersbank v. Colasscau*, 3 Ves. 164, 1 Barb. Ch. Pr. (2d ed.) 669, 2 *Id.* 522.

³⁰ *Moseby v. Burrow*, 52 Tex. 396. But it has been held, that where a mortgage of property situated in one state is executed to a receiver appointed in another state, such receiver, or his successor in office, may maintain an action in his own name to foreclose the mortgage in the state where the premises are situated. *Iglehart v. Bierce*, 36 Ill. 133. See *Dixon v. Buell*, Adm'r, 21 Ill. 203; *Townsend v. Carpenter*, 11 Ohio, 21.

the receiver's rights;³¹ but if the person appointed receiver fails to qualify under the order, he will acquire no interest in or right to the property.³²

§ 787. **Nature of receiver's possession.**—It has been said, where a receiver is appointed on the application of the mortgagee in a mortgage foreclosure, to take charge of the property and to collect the rents and profits, that such receiver is in law an agent of the mortgagor, the owner of the legal estate;³³ but the better doctrine seems to be that he is an officer of the court, appointed on behalf of all who may establish an interest in the property,³⁴ and not, in any sense, a representative of the party securing his appointment.³⁵ The property in his hands is *in custodia legis*;³⁶ his possession is the possession of the court and is entitled to its protection.³⁷

The possession of a receiver is valid as against attaching creditors, even when the property is situated in another state.³⁸

Where a court, having jurisdiction of the case, has appointed a receiver for the property which is the subject of the suit, and the receiver is in possession, no other court of co-ordinate jurisdiction can interfere with the property, or entertain complaints against the receiver, or remove him,³⁹ or in any way

³¹ *Porter v. Williams*, 9 N. Y. 142, 59 Am. Dec. 519.

³² *Cook v. Citizens' Bank*, 73 Ind. 256.

³³ See *Chinnery v. Evans*, 11 H. L. Cas. 134.

³⁴ *Iddings v. Bruen*, 4 Sandf. Ch. (N. Y.) 417; *Booth v. Clark*, 58 U. S. (17 How.) 322, 331, 15 L. ed. 164; *Skip v. Harwood*, 3 Atk. 564.

³⁵ *Lottimer v. Lord*, 4 E. D. Smith (N. Y.) 183; *Tillinghast v. Champlin*, 4 R. I. 173, 67 Am. Dec. 510; *Booth v. Clark*, 58 U. S. (17 How.) 322, 15 L. ed. 164; *Angel v. Smith*, 9 Ves. 336; *Jeremy Eq. Jur.* 248, 249, 2 Dan. Ch. Pr. 1406.

³⁶ *Ross v. Williams*, 11 Heisk. (Tenn.) 410.

³⁷ *King v. Ohio & M. R'y Co.* 7 Biss. C. C. 529; *Field v. Jones*, 11 Ga. 413; *Hutchinson v. Hampton*, 1 Mon. T. 39; *People v. Brooks*, 40 Mich. 333, 29 Am. Rep. 534; *Battle v. Davis*, 66 N. C. 252.

³⁸ *Chicago, M. & St. P. R. Co. v. Keokuk Northern Line Packet Co.* 108 Ill. 317, 48 Am. Rep. 557.

³⁹ *Bruce v. Manchester & K. R. Co.* 19 Fed. 342; *Young v. Montgomery & E. R. R. Co.* 2 Woods C. C. 606; *Kennedy v. Indianapolis. C. & L. R. Co.* 2 Flipp. C. C. 704,

interfere with his possession, without leave of the court which made the appointment.⁴⁰

§ 788. Rights and powers of receivers.—Until his appointment is complete, a receiver has no right to the rents and profits of the mortgaged premises, and then only to such as remain unpaid; because it is only by virtue of the receiver's appointment that the mortgagee acquires an equitable lien on the unpaid rents.⁴¹ A receiver appointed in a mortgage foreclosure has no powers except those conferred upon him by the order appointing him and by the practice of the court.⁴² And the powers thus conferred, do not extend beyond the jurisdiction of the court making the appointment.⁴³ Such a receiver has no authority, without an order of the court, to disperse money to any person,⁴⁴ or in any manner to lessen the funds in his hands, as by expenditures for repairs.⁴⁵

Where, pending the foreclosure of a mortgage on a farm, a receiver is appointed on the written assent of the solicitors of all the parties in interest, with power to let the premises, he may let the farm for a year without a special order of

3 Fed. 97, 11 Cent. L. J. 89, 26 Int. Rev. Rec. 390, 10 Rep. 359.

⁴⁰ See *Foster v. Townshend*, 2 Abb. (N. Y.) N. C. 29, 36; *Sea Ins. Co. v. Stebbins*, 8 Paige Ch. (N. Y.) 565; *Angel v. Smith*, 9 Ves. 336, 338; *Pelham v. Duchess of New Castle*, 3 Swan. 289, 293 n., 1 Story Eq. Jur. (11th ed.) 833a. See *post*, § 829.

⁴¹ *Rider v. Vrooman*, 12 Hun (N. Y.) 299. See *Bank of Ogdensburg v. Arnold*, 5 Paige Ch. (N. Y.) 38; *Favorite v. Deardorff*, 84 Ind. 555.

⁴² *Verplank v. Mercantile Ins. Co.* 2 Paige Ch. (N. Y.) 438, 452; *Booth v. Clark*, 58 U. S. (17 How.) 323, 331, 15 L. ed. 164. See *Lottimer v. Lord*, 4 E. D. Smith (N. Y.)

183; *In re Eagle Iron Works*, 8 Paige Ch. (N. Y.) 385; *Bowersbank v. Colasseau*, 3 Ves. 164.

⁴³ *Booth v. Clark*, 58 U. S. (17 How.) 322, 331, 15 L. ed. 164. See *ante*, § 786.

⁴⁴ *Duffy v. Casey*, 7 Robt. (N. Y.) 79. Counsel in a case cannot compel a receiver to pay them moneys to which they think themselves entitled, under penalty of removal. See *Hospes v. Almstedt*, 13 Mo. App. 270.

⁴⁵ *Wyckoff v. Scofield*, 103 N. Y. 630. It seems that the court may direct such expenditures, if they are necessary for the preservation of the property. *Wyckoff v. Scofield*, 103 N. Y. 630.

the court, that being the usual term for such lease; and such a lease will neither be limited nor terminated by the duration of the suit. If the mortgagee is appointed receiver, he must obtain as large a rent as possible, although it may exceed the amount due on his mortgage.⁴⁶

A receiver authorized as such to execute formal satisfactions and discharges of mortgages in his hands upon payment, has also authority to receive payment of the amounts secured by such mortgages, although the same may not be due at the time.⁴⁷ A receiver appointed in a mortgage foreclosure has the same powers and is governed by the same rules in respect to the bringing and the defending of suits as receivers in other actions.⁴⁸

§ 789. Rights and duties of receivers.—A receiver in a mortgage foreclosure, being an officer of the court, is entitled to receive the guidance and protection of such court,⁴⁹ and to be instructed as to his duties,⁵⁰ the same as receivers in other cases. In cases of doubt, and particularly in cases where

⁴⁶ *Bolles v. Duff*, 37 How. (N. Y.) Pr. 162. The receiver cannot become his own tenant, unless by consent of the parties. *Alven v. Bond*, 3 Irish Eq. 372; *Stannus v. French*, 13 Irish Eq. 161. Under the English rule, the practice required the receiver to obtain an order of the court before letting the lands. *Neale v. Bealing*, 3 Swanst. 304; *Morris v. Elme*, 1 Ves. Jr. 139; *Swaby v. Dickon*, 5 Sim. 631; *Robertson v. Armstrong*, 2 Molloy, 352, or its approbation of the matter; *Duffield v. Elwes*, 11 Beav. 590; *Wynne v. Newborough*, 1 Ves. Jr. 164.

⁴⁷ *Heermans v. Clarkson*, 64 N. Y. 171.

⁴⁸ See *Phelps v. Cole*, 3 N. Y. Code, 157; *Smith v. Woodruff*, 6 Abb. (N. Y.) Pr. 65; *Merritt v. Lyon*, 16 Wend. (N. Y.) 410; *Field v. Jones*, 11 Ga. 413, 417; *Gadsden v. Whaley*, 14 S. C. 210; *Booth v. Clark*, 58 U. S. (17 How.) 322, 331, 15 L. ed. 164.

⁴⁹ *Cammack v. Johnson*, 2 N. J. Eq. (1 H. W. Green) 163. See *In re Receivers of Globe Ins. Co.* 6 Paige Ch. (N. Y.) 102; *Hooper v. Winston*, 24 Ill. 353.

⁵⁰ See *Smith v. New York Cent. Stage Co.* 18 Abb. (N. Y.) Pr. 419, 28 How. (N. Y.) Pr. 208; *In re VanAllen*, 37 Barb. (N. Y.) 225; *Curtis v. Leavitt*, 10 How. (N. Y.) Pr. 481, 1 Abb. (N. Y.) Pr. 274.

there are conflicting interests or claims, the receiver should apply to the court for instruction.⁵¹

It is the duty of a receiver to obey the orders of the court which appointed him,⁵² and to act in all things with a view to the equitable rights of the parties in interest.⁵³ Where a mortgagee in possession is appointed receiver of the property, his individual interests must not be permitted to interfere with his duties as receiver.⁵⁴ A receiver must pay into court all the rents collected by him prior to the conveyance of the mortgaged premises pursuant to the terms of the judgment of foreclosure and sale.⁵⁵

§ 790. Rents bound from date of appointment of receiver.—A mortgagee has no claim, as mortgagee, to the rents and profits of the mortgaged premises, and can become entitled to receive them only by commencing proceedings for the foreclosure of his mortgage and procuring the appointment of a receiver,⁵⁶ except where the rents and profits have

⁵¹ *Lottimer v. Lord*, 4 E. D. Smith (N. Y.) 183. It is said, however, that a receiver should not, of his own motion, make an application to the court; but that, if he finds himself in circumstances of difficulty, he should request the plaintiff to make the necessary application, and that on his default, the receiver may properly apply. Edw. on Rec. 158, 2 Barb. Ch. Pr. (2d ed.) 287.

⁵² *Corey v. Long*, 12 Abb. (N. Y.) Pr. N. S. 427, 43 How. (N. Y.) Pr. 492. In case of the refusal of a receiver to obey the instructions of the court, the court can and ought to remove him. *Guardians' Savings Institution v. Bowling Green Savings Bank*, 65 Barb. (N. Y.) 275.

⁵³ It has been said that the receiver should follow the directions

of the particular plaintiff who procured his appointment or that of his legal advisers. *Lottimer v. Lord*, 4 E. D. Smith (N. Y.) 183.

⁵⁴ *Bolles v. Duff*, 54 Barb. (N. Y.) 215, 37 How. (N. Y.) Pr. 162.

⁵⁵ *Nichols v. Foster*, 9 N. Y. Wk. Dig. 468.

⁵⁶ *Wyckoff v. Scofield*, 98 N. Y. 475. See *Rider v. Bagley*, 84 N. Y. 461; *Argall v. Pitts*, 78 N. Y. 239. It was held in the case of *Rider v. Bagley*, *supra*, that by the appointment of a receiver in a foreclosure suit, the plaintiff obtains an equitable lien only upon the unpaid rents, and that until such appointment, the owner of the equity of redemption has a right to receive the rents and cannot be compelled to account for them.

been pledged, by an express stipulation in the mortgage, for the payment of the debt;⁵⁷ and even then he will be confined to the rents and profits accruing during the pendency of the suit.⁵⁸ He will also have authority to collect such rents and profits as have theretofore accrued, but have not yet come into the hands of the owner of the equity of redemption, and apply them to the payment of the mortgage debt;⁵⁹ but the court has no power to order rents which have already been collected and are in the possession of the owner, to be paid over to the receiver.⁶⁰ Neither will a receiver be entitled to rents and profits collected during the pendency of the motion for his appointment.⁶¹

A mortgagee has no right, as mortgagee, to the rents of the mortgaged premises which have been paid into court by a receiver appointed in a suit by legatees for the administration of the estate of the mortgagor, although the mortgagee may have obtained a decree for the foreclosure of his mortgage in the same court and may have sold the mortgaged

⁵⁷ See *ante*, § 758, note 90.

⁵⁸ *Argall v. Pitts*, 78 N. Y. 239; *Nealis v. Bussing*, 9 Daly (N. Y.) 305; *Leeds v. Gifford*, 41 N. J. Eq. (14 Stew.) 464; *Conover v. Grover*, 31 N. J. Eq. (4 Stew.) 539. See *Stillman v. Van Beuren*, 100 N. Y. 439. In *Nealis v. Bussing*, *supra*, it was held, where a receiver of the rents, issues and profits of mortgaged premises had been appointed in an action for the foreclosure of the mortgage, and notice of his appointment had been given to a lessee of the premises under a lease from the mortgagor, and the lessee had paid rent falling due to the receiver, that the mortgagor had no authority to accept a surrender from the lessee, or to execute a new lease of the premises during the continuance of the receivership.

and that such surrender and acceptance and new lease constituted no defense to an action by the receiver against the lessee for rent subsequently accruing and remaining unpaid.

⁵⁹ *Wyckoff v. Scofield*, 98 N. Y. 475; *Codrington v. Johnston*, 1 Beav. 524.

⁶⁰ *Wyckoff v. Scofield*, 98 N. Y. 475.

⁶¹ *Rider v. Bagley*, 84 N. Y. 461. Where another party than the mortgagee has acquired a legal or equitable interest in, or title to, the rents or profits, prior to the appointment of a receiver as provided in section 299 of the Civil Code, the mortgagee's claim to such rents or profits will be postponed to that of the intervening claim. *Woolley v. Holt*, 14 Bush (Ky.) 788.

premises, and part of the debt remains unsatisfied. He should have applied to the court to discharge the receiver in the suit for administration, and either entered into possession himself or applied for a receiver in his action for foreclosure.⁶² The receiver should compel tenants not parties, to attorn to him, or he will not be permitted to proceed against them by summary proceedings.⁶³

§ 791. Personal liability of receivers.—The liability of a receiver under a mortgage foreclosure is the same as that of a receiver appointed in any other case. Thus, a receiver will be personally liable for loss through neglect or a breach of duty,⁶⁴ or if he exceeds his authority.⁶⁵ If a receiver departs from the line of his duty, as marked out by the decree, and a loss ensues, he will be obliged to bear it, although he may have acted under the advice of counsel. But property lost while in the hands of a receiver, being *in custodia legis*, cannot be considered as lost by conversion, so as to render the obligors on a bond for its return, liable therefor.⁶⁶

Where a receiver, appointed upon the application of the mortgagee, embezzles or otherwise wastes the rents and profits, the loss will fall on the mortgagor, or on his estate.⁶⁷ A mortgagee is not liable for such wrongdoing by the receiver.⁶⁸ Yet it is said that a person, at whose instance a receiver is appointed, should see that he performs his duties, and that any loss which he might have prevented by proper diligence, must, as between him and the other litigants, be borne by him.⁶⁹

⁶² *Coddington v. Bispham*, 36 N. J. Eq. (9 Stew.) 574.

⁶³ *Bowery Savings Bank v. Richards*, 3 Hun (N. Y.) 366.

⁶⁴ As where loss is sustained by a tenant quitting possession and the receiver neglects to apply promptly to the court for authority to re-let. *Wilkins v. Lynch*, 2 Molloy, 499, Edw. on Rec. 573.

⁶⁵ *Hills v. Parker*, 111 Mass. 508,

15 Am. Rep. 63; *Stanton v. Alabama R. Co.* 2 Woods C. C. 506.

⁶⁶ *Wall v. Pulliam*, 5 Heisk. (Tenn.) 365.

⁶⁷ *Rigge v. Bowater*, 3 Bro. Ch. 365; *Hutchinson v. Lord Massarene*, 2 Ball. & B. (Ir. Ch.) 55.

⁶⁸ *Robinson v. Arkansas Loan & Trust Co.* 74 Ark. 292, 85 S. W. 413.

⁶⁹ *Downs v. Allen*, 10 Lea (Tenn.) 652. The court of chan-

cery of New Jersey, in the case of *Sorchan v. Maya*, 50 N. J. Eq. (5 Dick.) 288, 23 Atl. 479, hold that a complainant suing to foreclose a mortgage, who nominates and pro-

cures to be appointed as receiver his own solicitor and agent, will be compelled to bear the loss caused by the receiver's defalcation and the insufficiency of his sureties.

CHAPTER XXXI.

RECEIVER—WHEN WILL BE APPOINTED.

CAUSES FOR APPOINTMENT—INADEQUACY OF SECURITY—INSOLVENCY OF MORTGAGOR—PART ONLY OF DEBT DUE—WHEN RECEIVER DENIED—MORTGAGEE IN POSSESSION—ACCOUNTING BY RECEIVER—DISCHARGE.

- § 792. Causes for appointing a receiver—Generally.
- § 793. Inadequacy of security and insolvency of mortgagor.
- § 794. Receivership in New Jersey.
- § 795. Lien of mortgagee on rents and profits.
- § 796. Receiver of deceased mortgagor's estate.
- § 797. Imminent danger of loss or injury.
- § 798. Accumulation of taxes and interest, ground for appointing a receiver.
- § 799. Waste and fraud, causes for appointing a receiver.
- § 800. Injunction restraining sale, cause for appointing a receiver.
- § 801. When a receiver will not be appointed—Mortgagor giving security.
- § 802. Where part only of debt due, or premises can be sold in parcels.
- § 803. Where mortgagee guilty of laches—Validity of mortgage denied.
- § 804. Where property in possession of stranger to the foreclosure.
- § 805. Where a bill is filed to redeem.
- § 806. When rents cannot be applied under a receiver.
- § 807. When receiver applied for by defendant.
- § 808. Receiver not appointed during the time allowed for redemption.
- § 809. Receivers as between different mortgagees.
- § 810. Appointment of second receiver.
- § 811. No receiver where mortgagee holds legal title.
- § 812. No receiver where mortgagee in possession.
- § 813. Subsequent mortgagee redeeming from prior mortgagee in possession.
- § 814. Other cases for receiver where mortgagee in possession.
- § 815. When a receiver will be appointed against a mortgagee in possession.
- § 816. Receiver where first mortgagee out of possession.
- § 817. Receiver appointed upon the application of junior mortgagee.
- § 818. Receiver when junior mortgagee in possession.
- § 819. General practice in appointing receiver.
- § 820. Time of appointing receiver.
- § 821. Appointment of receiver before answer.

- § 822. Appointment of receiver after granting decree.
- § 823. Appointment of receiver after sale.
- § 824. Interference with receiver's possession.
- § 825. Remedy of parties claiming title paramount to receiver.
- § 826. Appeal—Continuance of receivership.
- § 827. Accounting of receivers.
- § 828. Compensation of receivers.
- § 829. Removal of receivers.
- § 830. Discharge of receivers.

§ 792. Causes for appointing a receiver—Generally.—

In an action for the foreclosure of a mortgage, the plaintiff is entitled to the appointment of a receiver to take charge of the property and to collect the rents and profits thereof, when it is made to appear, that the premises will probably be insufficient to pay the mortgage debt,⁷⁰ that the party who is liable for any deficiency in the security is insolvent,⁷¹ and that the plaintiff has *prima facie* an equitable right to the property in controversy. A receiver will also be appointed

⁷⁰ *MacKellar v. Rogers*, 52 N. Y. Supr. Ct. (20 J. & S.) 360; *Hollenbeck v. Donell*, 94 N. Y. 342; *Main v. Ginthert*, 92 Ind. 180; *Jacobs v. Gibson*, 9 Neb. 380. See *Barnett v. Nelson*, 54 Iowa, 41, 37 Am. Rep. 183; *Myton v. Davenport*, 51 Iowa, 583.

⁷¹ See *Mitchell v. Bartlett*, 51 N. Y. 447; *Astor v. Turner*, 2 Barb. (N. Y.) 444; *Hollenbeck v. Donell*, 29 Hun (N. Y.) 94, reversed in 94 N. Y. 342; *Sea Ins. Co. v. Stebbins*, 8 Paige Ch. (N. Y.) 565, 568; *Price v. Dowdy*, 34 Ark. 285; *Main v. Ginthert*, 92 Ind. 180; *White v. Griggs*, 54 Iowa, 650; *Myton v. Davenport*, 51 Iowa, 583; *Douglass v. Cline*, 12 Bush. (Ky.) 608; *Chase's Case*, 1 Bland Ch. (Md.) 206; *Brown v. Chase*, Walk. Ch. (Mich.) 43; *Phillips v. Eiland*, 52 Miss. 721; *Kerchner v. Fairley*, 80 N. C. 24; *Henshaw v. Wells*, 9 Mortg. Vol. II.—73.

Humph. (Tenn.) 568; *Schrieber v. Carey*, 48 Wis. 208; *Haas v. Chicago Building Soc.* 89 Ill. 502; *Brinkman v. Retzinger*, 82 Ind. 364; *McCaslin v. State*, 44 Ind. 151; *Smith v. Kelley*, 31 Hun (N. Y.) 388; *Burlingame v. Parse*, 12 Hun (N. Y.) 48; *Frelinghuysen v. Colden*, 4 Paige Ch. (N. Y.) 204; *Morris v. Branchaud*, 52 Wis. 191, 8 N. W. 383; *Grant v. Phoenix Mint. L. Ins. Co.* 121 U. S. 105, 30 L. ed. 909, 7 Sup. Ct. Rep. 841. The party applying must not only satisfy the court that there is a probability that the mortgaged premises will not sell for enough to satisfy the decree, but also that the party who is thus individually liable is himself responsible for the probable amount of such anticipated deficiency, after paying all his other just debts. *Morris v. Branchaud*, 52 Wis. 191; 8 N. W. 383

if circumstances of fraud or bad faith on the part of the mortgagor are shown,⁷² or if there are other facts involved in the case which would render the denial of a receiver inequitable or unjust.⁷³ A receiver will always be appointed when it is shown that the rents and profits have been expressly pledged by the terms of the mortgage for the payment of the debt.⁷⁴

The appointment of a receiver is always a matter resting in the sound discretion of the court;⁷⁵ and unless it is made clearly to appear that such discretionary power has been abused to the injury of the party complaining, it will not be interfered with.⁷⁶ And the better rule to govern that discretion is that which will grant the order of appointment, as it may or may not be an essential means to pay the debt secured by the mortgage.⁷⁷ Where the rents and profits are not pledged by the terms of the mortgage, the court must be satis-

⁷² *Haas v. Chicago Building Society*, 89 Ill. 498.

⁷³ *Haas v. Chicago Building Society*, 89 Ill. 498. See *Bloodgood v. Clark*, 4 Paige Ch. (N. Y.) 577. These facts may be made to appear by affidavits. See *Vann v. Barnet*, 2 Bro. Ch. 157; *Metcalfe v. Pulvertoft*, 1 Ves. & B. 180; *De Berrera v. Frost*, 33 Tex. Civ. App. 580.

⁷⁴ *Shotwell v. Smith*, 3 Edw. Ch. (N. Y.) 588; *Verplank v. Caines*, 1 Johns. Ch. (N. Y.) 57; *Tysen v. Wabash R. Co.* 8 Biss. C. C. 247. See *Morrison v. Buckner*, Hempst. C. C. 442; *Lloyd v. Passingham*, 16 Ves. 59; *West v. Adams*, 106 Ill. App. 114; *Ortengren v. Rice*, 104 Ill. App. 428; *Butler v. Frazer*, 57 N. Y. Supp. 900; *Ball v. Marske*, 202 Ill. 31, 66 N. E. 845. See *Warner v. Gouverneur's Ex.* 1 Barb. (N. Y.) 36, Edw. on Rec. 356 *et seq.*; *Sage v. Mendelson*, 42 Misc. 137, 85 N. Y. Supp. 1008;

Moncrieff as adm'r etc. v. Hare, 38 Colo. 221, 7 L.R.A.(N.S.) 1001, 87 Pac. 1082; *Handman v. Volk*, 99 S. W. 660. See also *Prussing v. Lancaster*, 234 Ill. 462, 84 N. E. 1062. But see *Brick v. Harnbeck*, 19 Misc. 218, 43 N. Y. Supp. 301.

⁷⁵ *Douglass v. Kline*, 12 Bush (Ky.) 644; *Nichols v. Perry P. A. Co.* 11 N. J. Eq. (3 Stock.) 126; *Sea Ins. Co. v. Stebbins*, 8 Paige Ch. (N. Y.) 565.

⁷⁶ *Jacobs v. Gibson*, 9 Neb. 380; *Lechner v. Green*, 104 Ill. App. 442; *New York Building Loan Banking Co. v. Begly*, 75 App. Div. 308, 78 N. Y. Supp. 169. See also *Land Title & Trust Co. v. Kellogg*, 73 N. J. Eq. 524, 68 Atl. 80.

⁷⁷ *Myers v. Estell*, 48 Miss. 403; *Ogdensburgh Bank v. Arnold*, 5 Paige Ch. (N. Y.) 39; *Clason v. Corley*, 5 Sandf. (N. Y.) 447; *Schreiber v. Carey*, 48 Wis. 208, 213, 4 N. W. 124.

fied that the premises are insufficient to pay the debt and that there are other circumstances which justify the appointment;⁷⁸ but where the rents and profits are expressly pledged for the payment of the debt, the mortgagee or his assignee need not conclusively establish a right to recover on the mortgage. If, in such a case, he makes out a probable right to recover and shows the insolvency of the debtor, he will be entitled to the appointment of a receiver.⁷⁹

In Indiana,⁸⁰ the appointment of a receiver in a suit to foreclose a mortgage may be made without reference to the solvency of the mortgagor, where it appears that the mortgaged property is not sufficient to satisfy the debt; and the mortgagee is authorized to take possession of the land and the crops growing thereon, although the mortgagor may be in possession at the time.⁸¹

It is said that a receiver will not be appointed before answer in all those cases where the complaint does not aver that there was any wrongful interference on the part of the defendants with the duties of the trustees, or show what title or interest the plaintiff had, or contain any allegation of insolvency on the part of the defendants, or that there is danger to the property or interests concerned.⁸²

§ 793. Inadequacy of security and insolvency of mortgagor.—In an action for the foreclosure of a mortgage the court has power to appoint a receiver of the rents and profits of the mortgaged premises, where the whole amount of the

⁷⁸ *Shotwell v. Smith*, 3 Edw. Ch. (N. Y.) 588; *Whitehead v. Wooten*, 43 Miss. 523; *Frisbie v. Bateman*, 24 N. J. Eq. (9 C. E. Gr.) 28; *Cortleyeu v. Hathaway*, 11 N. J. Eq. (3 Stockt.) 39, 64 Am. Dec. 478. See *Locke as adm'x etc. v. Klunker, as adm'x etc.* 123 Cal. 231, 55 Pac. 993.

⁷⁹ *Des Moines Gas Co. v. West*, 44 Iowa, 23.

⁸⁰ Ind. Rev. Stat. § 1222.

⁸¹ *Hursh v. Hursh*, 99 Ind. 500.

⁸² *Turnbull v. Prentiss Lumber Co.* 55 Mich. 387, 21 N. W. 380; *West v. Swan*, 3 Edw. Ch. (N. Y.) 420; *Simmons v. Wood*, 45 How. (N. Y.) Pr. 269; *Vann v. Barnett*, 2 Bro. Ch. 158; *Metcalf v. Pulvertoft*, 1 Ves. & B. 180.

mortgage is due,⁸³ and it is made to appear, that the proceeds of the sale will probably be insufficient to satisfy the debt secured,⁸⁴ that the property is rapidly depreciating in value,⁸⁵ and that the mortgagor, or other party personally liable for the mortgage debt, is insolvent.⁸⁶

Where a corporation is the defendant owner in a mortgage foreclosure, a receiver will be appointed only when the mortgage debt, or the interest thereon, has remained unpaid for at least thirty days after it became due, and has been demanded of the proper officer of such corporation; and he will be appointed then, only when the rents of such property have been specifically pledged in the mortgage, or the property itself will probably be insufficient to pay the amount of the mortgage debt.⁸⁷

⁸³ *Bank of Ogdensburg v. Arnold*, 5 Paige Ch. (N. Y.) 38.

⁸⁴ *Jacobs v. Gibson*, 9 Neb. 380. See *Haas v. Chicago Building Society*, 89 Ill. 498; *Newport & Cinn. Bridge Co. v. Douglass*, 12 Bush (Ky.) 673; *Browning v. Stacey*, 52 App. Div. 626, 65 N. Y. Supp. 203; *Chambers as ex'r etc. v. Barker*, 2 Neb. (Unof.) 523, 89 N. W. 388; *Sweet & Clark Co. v. Union National Bank of Troy*, 149 Ind. 305, 49 N. E. 159.

⁸⁵ *Smith v. Kelley*, 31 Hun (N. Y.) 387.

⁸⁶ *Hollenbeck v. Donnell*, 94 N. Y. 342, reversing 29 Hun (N. Y.) 94; *Warner v. Gouverneur's Ex.* 1 Barb. (N. Y.) 36; *Shotwell v. Smith*, 3 Edw. Ch. (N. Y.) 588; *Verplank v. Caines*, 1 Johns. Ch. (N. Y.) 58; *Astor v. Turner*, 11 Paige Ch. (N. Y.) 436, 43 Am. Dec. 766; *Howell v. Ripley*, 10 Paige Ch. (N. Y.) 45; *Sea Insurance Co. v. Stebbins*, 8 Paige Ch. (N. Y.) 565; *Bank of Ogdensburg*

v. Arnold, 5 Paige Ch. (N. Y.) 38; *Quincy v. Cheesman*, 4 Sandf. Ch. (N. Y.) 405; *Hughes v. Hatchett*, 55 Ala. 631; *Price v. Dowdy*, 34 Ark. 285; *Jacobs v. Gibson*, 9 Neb. 380; *Tysen v. Wabash R. Co.* 8 Biss. C. C. 247; *Hunter v. Hays*, 7 Biss. C. C. 362; *Morrison v. Buckner*, Hempst. C. C. 442; *Lloyd v. Passingham*, 16 Ves. 59; *Albritton v. Lott-Blacksher Commission Co.* 167 Ala. 541, 52 So. 653; *American National Bank v. Northwestern Mutual Life Ins. Co.* 89 Fed. 610; *Winkler as ex'r etc. v. Magdeburg as assignee etc.* 100 Wis. 421, 76 N. W. 332; *Veerhoff as ex'r etc. v. Miller*, 30 App. Div. 355, 51 N. Y. Supp. 1048. See *Elmira Mechanics' Society of New York v. Stanchfield*, 160 Fed. 811, 87 C. C. A. 585 (Colo.) See also *Land Title & Trust Co. v. Kellogg*, 73 N. J. Eq. 524, 68 Atl. 80.

⁸⁷ Laws of New York for 1870, chap. 151, § 3.

To entitle a mortgagee to a receiver he must show clearly that the mortgaged premises are an inadequate security for the debt⁸⁸ and that the mortgagor, or other party personally liable for the debt, is insolvent.⁸⁹ Some of the cases hold that the mortgagor must be shown to be hopelessly insolvent;⁹⁰ others, however, hold that in order to justify the appointment of a receiver in a foreclosure, it need not appear that the mortgagor is insolvent, if it is shown that the mortgaged property is of insufficient value to pay the debt.⁹¹

In no case will a receiver be appointed, if it is clear that on a sale under the decree of foreclosure, the mortgaged property will sell for enough to pay the debt, interest and costs.⁹² It is said to be erroneous to appoint a receiver in a foreclosure, where neither waste, nor failure to pay taxes, nor diminution of the value of the security, nor increase of the mortgage debt is shown, and where it does not appear that the party personally liable for the debt is not responsible for any probable deficiency.⁹³

⁸⁸ See *Ruprecht v. Henrici*, 113 Ill. App. 398.

⁸⁹ *Syracuse Bank v. Tallman*, 31 Barb. (N. Y.) 201; *Tyler v. Poppe*, 4 Edw. Ch. (N. Y.) 430; *Shotwell v. Smith*, 3 Edw. Ch. (N. Y.) 588; *Willis v. Corliss*, 2 Edw. Ch. (N. Y.) 281, 287; *Haggarty v. Pittman*, 1 Paige Ch. (N. Y.) 298, 19 Am. Dec. 434; *Wooding v. Malone*, 30 Ga. 979; *Edie v. Applegate*, 14 Iowa, 273; *Cofer v. Echerson*, 6 Iowa, 502; *Blondheim v. Moore*, 11 Md. 365, 374; *Clark v. Ridgely*, 1 Md. Ch. Dec. 70; *Welche v. Schoenberg*, 45 Misc. 126, 91 N. Y. Supp. 880; *Ætna Life Ins. Co. v. Broecker*, 166 Ind. 576, 77 N. E. 1092; *West v. Adams, as trustee, etc.* 106 Ill. App. 114; *Richey v. Guild*, 99 Ill. App. 451; *Gooden v. Finke*, 87 Ill. App. 562; *Glos v.*

Roach, 80 Ill. App. 283.

⁹⁰ *Cone v. Coombs*, 5 McCr. C. C. 651, 18 Fed. 576.

⁹¹ *Hursh v. Hursh*, 99 Ind. 500; *Waldron v. First National Bank*, 60 Neb. 245, 82 N. W. 856. See *Browning v. Sire*, 56 App. Div. 399, 67 N. Y. Supp. 798; *Roberts v. Parker*, 14 S. D. 323, 85 N. W. 591. See also *Land Title & Trust Co. v. Kellogg*, 73 N. J. Eq. 524, 68 Atl. 80; *Ball v. Marske*, 202 Ill. 31, 66 N. E. 845.

⁹² *Shotwell v. Smith*, 3 Edw. Ch. (N. Y.) 588; *Pullan v. Cincinnati & C. R. R. Co.* 4 Biss. C. C. 35. See *Ætna Life Ins. Co. v. Broecker*, 166 Ind. 576, 77 N. E. 1092; *Rogers v. Southern Pine Lumber Co.* 21 Tex. Civ. App. 48, 51 S. W. 26.

⁹³ *Morris v. Branchaud*, 52 Wis. 187.

§ 794. **Receivership in New Jersey.**—It seems that the rule in New York and in other states, allowing a receiver where the premises are an inadequate security for the debt, and the mortgagor, or other party personally liable therefor, is insolvent, has never been adopted in New Jersey, where a distinction is made between a first and a subsequent mortgage, their rights being essentially different in that state.

The first mortgagee has a legal right to the rents and profits, and has his remedy at law by ejectment. A subsequent mortgagee is better entitled to the remedy of a receiver, because he has no right at law to the possession of the premises as against a prior mortgagee.⁹⁴ But where it appears that the mortgagor is insolvent and has removed from the premises and given the possession thereof to a party who occupies them for his own use without paying rent, and it also appears that the mortgagor is committing waste and that the premises are an insufficient security for the debt, a court of equity will appoint a receiver to take charge of the property while the prior mortgagee is prosecuting his ejectment at law to obtain possession of the mortgaged premises.⁹⁵

§ 795. **Lien of mortgagee on rents and profits.**—On a condition broken, by which a mortgagee is authorized to commence a foreclosure, he will have an equitable lien upon the rents and profits of the mortgaged property, if it is an inadequate security for the debt, which lien may be enforced by proper proceedings;⁹⁶ but if he makes no demand for the rents, and takes no steps to have them applied to his debt, the mortgagor can continue to collect them,⁹⁷ because until the mortgagee takes possession of the premises or files a bill for foreclosure and procures the appointment of a receiver,

⁹⁴ *Cortleyou v. Hathaway*, 11 N. J. Eq. (3 Stockt.) 40, 42, 64 Am. Dec. 478.

⁹⁵ *Brasted v. Sutton*, 30 N. J. Eq. (3 Stew.) 462.

⁹⁶ *Jacobs v. Gibson*, 9 Neb. 380;

Hunter v. Hays, 7 Biss. C. C. 362; *Strain v. Palmer*, 159 Fed. 628, 86 C. C. A. 618 (Mont.)

⁹⁷ *Hunter v. Hays*, 7 Biss. C. C. 362.

the mortgagor is "owner to all the world," and is entitled to all the profits made.⁹⁸

Where an assignee in bankruptcy is collecting the rents and profits, if the mortgagee desires them to be applied specifically to his lien, he must not only show the insufficiency of the security, without the pertainance of the rents and profits, but he must also intercept them before they reach the assignee.⁹⁹ Where, however, only one-sixth of the mortgage debt is due, and the premises are so divided that a part can be sold, a receiver should not be appointed for the whole of the mortgaged premises, but only for a proportionate part thereof, sufficient protection being afforded thereby.¹

Notwithstanding the changes in the practice of foreclosing mortgages, the remedy by a receiver remains the same under the New York Code of Civil Procedure as under the old chancery practice,² and the mortgagee may obtain a specific lien upon the rents and profits of the premises, though not pledged in the mortgage for the payment of the debt, by diligently obtaining the appointment of a receiver; a subsequent mortgagee may thus gain an advantage over a prior mortgagee as to the rents and profits.³

§ 796. Receiver of deceased mortgagor's estate.—In the appointment of receivers in mortgage foreclosures, no exception is made in favor of the executors or administrators of deceased mortgagors.⁴ No matter who the defendants

⁹⁸ *American Bridge Co. v. Heidelberg*, 94 U. S. (4 Otto), 798, 800, 24 L. ed. 322, 15 Alb. L. J. 294.

⁹⁹ *Foster v. Rhodes*, 10 Bankr. Reg. 523.

¹ *Hollenbeck v. Donnell*, 94 N. Y. 342, reversing 29 Hun (N. Y.) 94.

² *Hollenbeck v. Donnell*, 94 N. Y. 342, 345. See *Post v. Dorr*, 4 Edw. Ch. (N. Y.) 412.

³ *Post v. Dorr*, 4 Edw. Ch. (N. Y.) 412; *Howell v. Ripley*, 10 Paige

Ch. (N. Y.) 43; *Thomas v. Brigstocke*, 4 Russ. 64. See *post*, § 817.

⁴ *Jacobs v. Gibson*, 9 Neb. 380. In *Kerchner v. Fairley*, 80 N. C. 24, the plaintiff mortgagee was administrator of one of two mortgagors, whose heirs and the other mortgagor were defendants in an action to foreclose the mortgage; the property mortgaged was inadequate to pay the debt, and the mortgagor in possession was insolvent;

may be, if the mortgaged property will probably be insufficient to discharge the mortgage debt, the plaintiff is in a position to demand that his security be augmented by enough of the rents and profits to make it good. There is no good reason for making an exception in favor of the representative of a deceased mortgagor; nor can a court, in justice to the mortgagee, do so, for it is very clear that rents collected by the administrator or executor would not be subject to the lien of the mortgage, but would belong to the general assets of the estate and be distributed accordingly among all its creditors.⁵

When a receiver is sought against an executor, administrator or other trustee, to collect rents and to manage the estate, it must be established by suitable proof that there has been some positive loss, or that there is danger of loss of the funds, as by waste, or misapplication, or apprehended insolvency,⁶ or personal fraud,⁷ or misconduct, or negligence on the part of such trustee. The mere poverty of the trustee is not a sufficient cause;⁸ unfitness,⁹ or an abuse of the trust, or danger of insolvency, or some other sufficient cause, must be shown.¹⁰

the plaintiff denied an alleged payment of the debt and the existence of assets in his hands applicable thereto; the court held that, in such a case, it was not error, on application of the plaintiff, to appoint a receiver to secure the rents and profits pending the litigation.

⁵ *Jacobs v. Gibson*, 9 Neb. 380, 383. The Nebraska Code of Civil Procedure, Gen. Stat. 568, § 266, 2d. subd. provides that, "in an action for the foreclosure of a mortgage, when the mortgaged property is in danger of being lost, removed or materially injured, or is probably

insufficient to discharge the mortgage debt," a receiver may be appointed.

⁶ *Middletown v. Dodswell*, 13 Ves. 266.

⁷ See *Chautauqua County Bank v. White*, 6 N. Y. 236, 57 Am. Dec. 442; *McElwain v. Willis*, 9 Wend. (N. Y.) 548, 561; *Stileman v. Ashdown*, 2 Atk. 477; *Edgell v. Haywood*, 3 Atk. 357.

⁸ 2 Story Eq. Jur. (11th ed.) § 386.

⁹ *Anon.* 12 Ves. 4.

¹⁰ *Middleton v. Dodswell*, 13 Ves. 266.

§ 797. **Imminent danger of loss or injury.**—After an action for foreclosure has been commenced and it is made to appear that the property in litigation, or the rents and profits thereof, are in danger of loss or injury, a receiver may be appointed to take charge of such rents and profits in the interest of the litigants;¹¹ but the rents and profits of the mortgagee's security must be in actual danger to warrant such an appointment.¹² Thus, if the mortgagor of an estate, which is subject to a rent charge, refuses to pay the rent, a receiver may be appointed.¹³ And a mortgagee of a leasehold, who has made advances to prevent eviction for non-payment of rent by the mortgagor, may have a receiver appointed, notwithstanding the fact that the interest on the mortgage may have been regularly and promptly paid.¹⁴

If it appears to the court that the property is in danger of being lost¹⁵ or materially injured,¹⁶ or if there is reason to apprehend that the mortgagee will be in a worse situation if the appointment is delayed,¹⁷ the appointment of a receiver will be granted almost as a matter of course.¹⁸ Thus, it is

¹¹ *Newport & Cin. Bridge Co. v. Douglass*, 12 Bush (Ky.) 673; *Ferguson v. Dickinson*, 138 S. W. 221 (Tex. Civ. App.). See *Shotwell v. Smith*, 3 Edw. Ch. (N. Y.) 588; *Verplank v. Caines*, 1 Johns. Ch. (N. Y.) 57; *Morrison v. Buckner*, Hempst. C. C. 442; *Tysen v. Wabash R. Co.* 8 Biss. C. C. 247; *Parkhurst v. Kinsman*, 2 Blatchf. C. C. 78; *Lloyd v. Passingham*, 16 Ves. 59, N. Y. Code Civ. Proc. § 713. See *Meridian Oil Co. v. Randolph*, 26 Okla. 634, 110 Pac. 722; *Philadelphia Mortgage & Trust Co. v. Oyler*, 61 Neb. 702, 85 N. W. 899.

¹² *Chase's Case*, 1 Bland Ch. (Md.) 266, 17 Am. Dec. 277.

¹³ *Pritchard v. Fleetwood*, 1 Meriv. 54; *Harris v. Shee*, 1 J. & LaT. 92, 6 Ir. Eq. 543.

¹⁴ *Kelly v. Stanton*, 1 Hog. 393.

¹⁵ *Bloodgood v. Clark*, 4 Paige Ch. (N. Y.) 577; *Evans v. Coventry*, 5 DeG., M. & G. 811, 918; *Metcalfe v. Pulvertoft*, 1 Ves. & B. 180.

¹⁶ *Williamson v. Wilson*, 1 Bland Ch. (Md.) 421; *Chace's Case*, 1 Bland Ch. (Md.) 213, 17 Am. Dec. 277; *Levenson v. Elson*, 88 N. C. 182.

¹⁷ *Thomas v. Davies*, 11 Beav. 29; *Metcalfe v. Pulvertoft*, 1 Ves. & B. 180; *Aberdeen v. Chitty*, 3 Y. & C. 370, 382.

¹⁸ *Oldfield v. Cobbett*, 4 L. J. Ch. (N. S.) 272; *Middleton v. Dods-well*, 13 Ves. 266.

thought that the court may, in its discretion, appoint a receiver of the rents and profits during the pendency of a foreclosure, where it appears that the premises are chiefly valuable for use during the continuance of an oil business, and that they are rapidly depreciating in value by reason of the fact that the oil business is rapidly decreasing at that point.¹⁹ Reason for apprehending that the rents and profits will be lost and the security thereby impaired, is the primary ground for appointing a receiver.²⁰

§ 798. Accumulation of taxes and interest, ground for appointing a receiver.—In proceedings to foreclose a mortgage, a receiver should be appointed on the application of the plaintiff in a case where the mortgaged premises are an inadequate security for the debt, or where he has no personal security and the mortgagor has not paid the interest or the taxes on the premises,²¹ even though the unpaid taxes may be a lien subsequent to the mortgage.²² Where it is shown that the mortgaged premises are about to be sold for taxes, a receiver will be immediately appointed.²³

¹⁹ *Smith v. Kelley*, 31 Hun (N. Y.) 387.

²⁰ *Rollins v. Henry*, 77 N. C. 467. Where the defendant in an action to foreclose a trust deed on a mill property suffered it to be idle, and the plaintiffs took possession of and managed it, the court held that neither the mill nor the rents were in such "danger of being lost or materially injured" as entitled the plaintiffs to the appointment of a receiver. *Sleeper v. Iselin*, 59 Iowa, 379.

²¹ *Mahon v. Crothers*, 28 N. J. Eq. (1 Stew.) 567; *Finch v. Houghton*, 19 Wis. 149. See *Sidenberg v. Ely*, 90 N. Y. 257, 43 Am. Rep. 163; *Wall Street Ins. Co. v. Loud*, 20 How. (N. Y.) Pr. 95; *McLane v.*

Placerville & S. V. R. Co. 66 Cal. 606; *Buchanan v. Berkshire L. Ins. Co.* 96 Ind. 510; *Callanan v. Shaw*, 19 Iowa, 183; *Clagett v. Salmon*, 5 Gill & J. (Md.) 314; *Brown v. Chase*, Walk. Ch. (Mich.) 43; *Stockman v. Wallis*, 30 N. J. Eq. (3 Stew.) 449; *Johnson v. Tucker*, 2 Tenn. Ch. 398. See also *Haas v. Chicago Building Society*, 89 Ill. 498; *Brasted v. Sutton*, 30 N. J. Eq. (3 Stew.) 462; *Chetwood v. Coffin*, 30 N. J. Eq. (3 Stew.) 450; *Oliver v. Decatur*, 4 Cr. C. C. 458; *Gale v. Carter*, 154 Ill. App. 478. But see *Ferguson v. Dickinson*, 138 S. W. 221 (Tex. Civ. App.)

²² *Chetwood v. Coffin*, 30 N. J. Eq. (3 Stew.) 450.

²³ *Darusmont v. Patton*, 4 Lea

§ 799. Waste and fraud, causes for appointing a receiver.—Where waste has been committed by a person in possession of the property, or it has depreciated in value through the fault and negligence of the mortgagor in possession, or where he is misapplying the rents and profits, the mortgagee will be entitled to the appointment of a receiver.²⁴ Thus, although a mortgagor has a right to cut timber, yet where he has become insolvent and exercises this right in bad faith, a receiver will be appointed to take charge of the premises.²⁵

(Tenn.) 597. See *Haas v. Chicago Building Society*, 89 Ill. 498; *Ortengren v. Rice*, 104 Ill. App. 428.

²⁴ *Wall St. Fire Ins. Co. v. Loud*, 20 How. (N. Y.) Pr. 95; *Worrill v. Coker*, 56 Ga. 666; *Haas v. Chicago Building Soc.* 89 Ill. 498; *Brasted v. Sutton*, 30 N. J. Eq. (3 Stew.) 462; *Chetwood v. Coffin*, 30 N. J. Eq. (3 Stew.) 450; *Stockman v. Wallis*, 30 N. J. Eq. (3 Stew.) 450; *Mahon v. Crothers*, 28 N. J. Eq. (1 Stew.) 567; *Johnson v. Tucker*, 2 Tenn. Ch. 398; *Finch v. Houghton*, 19 Wis. 149; *Oliver v. Decatur*, 4 Cr. C. C. 458. See *Chappell v. Boyd*, 56 Ga. 578; *Tufts v. Little*, 56 Ga. 139; *Farmers' Loan & Trust Co. v. Meridian Waterworks Co.* 139 Fed. 661 (Miss.)

²⁵ Or he may be restrained by an injunction. *Ensign v. Colburn*, 11 Paige Ch. (N. Y.) 503. It has been said that the mortgage covers the timber standing on the premises, and that when it is severed from the freehold without the consent of the mortgagee, he has a right to hold it as a part of his security. *Hutchins v. King*, 66 U. S. (1 Wall.) 53, 17 L. ed. 693. But the general doctrine seems to be that the mortgagee cannot maintain

trover for trees cut by the mortgagor. *Johnson v. White*, 11 Barb. (N. Y.) 194; *VanWyck v. Alliger*, 6 Barb. (N. Y.) 507; *Watson v. Hunter*, 5 Johns. Ch. (N. Y.) 169, 9 Am. Dec. 295; *Winship v. Pitts*, 3 Paige Ch. (N. Y.) 259; *People v. Alberty*, 11 Wend. (N. Y.) 160. Yet it is held that where the mortgagor is insolvent, the mortgagee may maintain an action for an unauthorized injury to the mortgage security. *Morgan v. Gilbert*, 2 Flip C. C. 645, 2 Fed. 835; *Willard's Eq. Jur.* 371, 379. After the timber upon the mortgaged premises has been severed from the freehold, a court of equity cannot restrain its removal; *Johnson v. White*, 11 Barb. (N. Y.) 194; *VanWyck v. Alliger*, 6 Barb. (N. Y.) 507; *Watson v. McClay*, 5 Johns. Ch. (N. Y.) 169, 9 Am. Dec. 295; *Hawley v. Clowes*, 2 Johns. Ch. (N. Y.) 122; *Ensign v. Colburn*, 11 Paige Ch. (N. Y.) 503; *Winship v. Pitts*, 3 Paige Ch. (N. Y.) 259; *People v. Alberty*, 11 Wend. (N. Y.) 160, 2 Story Eq. Jur. (11th ed.) §§ 1016, 1017; *Willard's Eq. Jur.* 371, 379; but will restrain further waste, *Weatherby v. Wood*, 29 How. (N. Y.) Pr. 404, and decree an accounting for the

Pending an appeal in a mortgage foreclosure, a receiver may be appointed to preserve the rents and profits, where such rents and profits are being wasted by an heir in possession.²⁶ In case there is fraudulent conduct on the part of the mortgagor, combined with danger of injury to the mortgaged premises, a receiver will be appointed to take charge of the rents and profits and to preserve the mortgaged property;²⁷ but in such a case, the pleadings should contain allegations of specific charges of fraud or of imminent danger of injury to the property.²⁸

§ 800. Injunction restraining sale, cause for appointing a receiver.—In a case where the mortgagor has obtained an injunction restraining the sale of the mortgaged premises, until certain counter-claims can be passed upon and the sum really due on the mortgage is ascertained, the mortgagee will be entitled to have a receiver appointed to take charge of the property and to secure the rents and profits thereof, where they are in danger of being lost.²⁹

In *Warwick v. Hammell*,³⁰ a second mortgagee had obtained an order of sale in a foreclosure, and a stay was procured by a third person, who attacked the plaintiff's title to the mortgage in a court of equity. The mortgagor in posses-

timber cut, *Johnson v. White*, 11 Barb. (N. Y.) 197; *Spear v. Cutter*, 5 Barb. (N. Y.) 486, 2 N. Y. Code 100, 2 Story Eq. Jur. (11th ed.) §§ 957, 1016, 1017.

²⁶ *Brinkman v. Ritzinger*, 82 Ind. 358.

²⁷ See *Orphan Asylum v. McCartee*, Hopk. Ch. (N. Y.) 429; *Tomlinson v. Ward*, 2 Conn. 396; *Powell v. Quinn*, 49 Ga. 523; *Crawford v. Ress*, 39 Ga. 44; *Jones v. Dougherty*, 10 Ga. 273; *Voshell v. Hynson*, 26 Md. 83; *Haight v. Burr*, 19 Md. 134; *State v. Northern Cent. R. R. Co.* 18 Md. 193; *Blondheim*

v. Moore, 11 Md. 365; *Furlong v. Edwards*, 3 Md. 99; *Thompson v. Diffenderfer*, 1 Md. Ch. Dec. 489; *Mays v. Rose*, 1 Freem. Ch. (Miss.) 703; *Maynard v. Railey*, 2 Nev. 313; *Ladd v. Harvey*, 21 N. H. (1 Fost.) 514; *Mordaunt v. Hooper*, 1 Amb. 311; *Lloyd v. Passingham*, 16 Ves. 59; *Middleton v. Dodswell*, 13 Ves. 266; *Hugonin v. Basley*, 13 Ves. 105; *Anon.* 12 Ves. 4.

²⁸ *Powell v. Quinn*, 49 Ga. 523.

²⁹ *Oldham v. Wilmington Bank*, 84 N. C. 304.

³⁰ 32 N. J. Eq. (5 Stew.) 427.

sion of the premises was insolvent, and neither the taxes nor the interest on any of the incumbrances having been paid for three years, the second mortgagee was held to be entitled to a receiver of the rents and profits of the mortgaged premises, pending the litigation with the person attacking his title to the mortgage.

§ 801. When a receiver will not be appointed—Mortgagor giving security.—Where the mortgaged property is of such value, that the debt can be paid from the proceeds of a sale of the premises under foreclosure, a receiver will not be appointed;³¹ and if the party in possession of the premises, as owner of the equity of redemption, is solvent, there is no such reasonable cause for a receiver as will warrant an appointment, although the mortgagor himself may be insolvent.³²

A court has no authority to interfere with a mortgagor's right to collect the rents and profits of the mortgaged premises, unless such rents and profits, as well as the property, have been pledged as security for the payment of the debt, or unless a clear want of sufficient security, or waste, or failure to pay taxes, or diminution of the value of the security, or mismanagement of the property, or an increase of the mortgage debt is shown.³³ A receiver will not be appointed, in the absence of any of the causes above set forth, merely because the mortgagee wishes to turn the rents and profits to his own use, when such appointment will be to the injury

³¹ *Williams v. Noland*, 2 Tenn. Ch. 151. See *Worrill v. Coker*, 56 Ga. 666; *Pullan v. Cincinnati & C. O. R. Co.* 4 Biss. C. C. 35; *Rabinowitz v. Power*, 131 App. Div. 892, 115 N. Y. Supp. 266.

³² *Silverman v. Northwestern Mut. L. Ins. Co.* 5 Ill. App. 124.

³³ *Shotwell v. Smith*, 3 Edw. Ch.

(N. Y.) 588; *Bank of Ogdensburg v. Arnold*, 5 Paige Ch. (N. Y.) 38; *Quincy v. Cheeseman*, 4 Sandf. Ch. (N. Y.) 405; *Eslava v. Crampton*, 61 Ala. 507; *Sales v. Lusk*, 60 Wis. 490, 18 Rep. 382; *Morris v. Branchaud*, 52 Wis. 187; *Pullan v. Cincinnati & C. R. Co.* 4 Biss. C. C. 35.

of a prior mortgagee;³⁴ nor will a receiver be appointed on the application of one defendant as against another.³⁵

Even if there are reasonable grounds for believing that the mortgage security is inadequate to satisfy the debt, a receiver will not be allowed on the application of the plaintiff, if the person in possession of the mortgaged premises, or the party liable for the deficiency, gives security to account for the rents and profits as the court shall direct, in case there is a deficiency upon the sale of the premises under a decree of foreclosure.³⁶ Where the rents and profits of the mortgaged premises have been already applied to the payment of the mortgage debt, and of the necessary expenses incurred in the management and care of the property, an application for the appointment of a receiver will be denied.³⁷

§ 802. Where part only of debt due, or premises can be sold in parcels.—In those cases where the whole debt is not due, if the mortgagee has neglected to take a specific pledge of the rents and profits of the mortgaged premises as security for his debt before it becomes due, he will have no equitable right to the rents and profits in the meantime,³⁸ and a receiver will not be appointed on his application, except possibly in case of the death of the mortgagor.³⁹

³⁴ *Sales v. Lusk*, 60 Wis. 490, 18 Rep. 382.

³⁵ *Robinson v. Hadley*, 11 Beav. 614.

³⁶ *Sea Ins. Co. v. Stebbins*, 8 Paige Ch. (N. Y.) 565. See *Harper v. Grambling*, 66 Ga. 236; *Rich v. Colquitt*, 65 Ga. 113; *Glantham v. Lucas*, 15 W. Va. 425; *Talbot v. Hope Scott*, 4 Kay & J. 141; *Pritchard v. Fleetwood*, 1 Meriv. 54; *Curling v. Townshend*, 19 Ves. 633. Compare *Clark v. Johnston*, 15 W. Va. 804.

³⁷ *Myton v. Davenport*, 51 Iowa, 583. See *Cortleyeu v. Hathaway*, 11 N. J. Eq. (3 Stockt.) 39, 64 Am. Dec. 478.

³⁸ *Bank of Ogdensburg v. Arnold*, 5 Paige Ch. (N. Y.) 38. See *Astor v. Turner*, 11 Paige Ch. (N. Y.) 436, 43 Am. Dec. 766; *Howell v. Ripley*, 10 Paige Ch. (N. Y.) 45.

³⁹ *Burrowes v. Malloy*, 2 Jo. & LaT. 521.

Where only a portion of the mortgage debt is due and no waste or failure to pay taxes, or diminution of value of the security, or increase of the mortgage debt is shown,⁴⁰ and the mortgaged premises are capable of being divided and sold in parcels separately without injury to the parties interested, in the absence of any pledge or specific appropriation, by which accruing rents of that portion of the premises not yet liable to be sold, are constituted a security to the mortgagee for the portion of the mortgage not yet due, he will not be entitled to a receivership, for the protection of the unmatured portion of the debt, of that portion of the premises for the sale of which he has no accrued right.⁴¹

§ 803. Where mortgagee guilty of laches—Validity of mortgage denied.—Where, from lapse of time or other circumstances, a mortgage is presumed to have been paid, a receiver will not be allowed.⁴² Thus, in a case where a mortgagee delayed his suit for foreclosure and permitted the mortgagor to use the property for several years, and after a decree was rendered and a sale ordered, neglected to enforce the same, a motion for the appointment of a receiver was denied, the court saying: "While it is true that the mortgagee may delay his suit for foreclosure after the debt is due and default of the mortgagor to pay it, yet if he delays his remedy and permits the mortgagor to use the property for several years, a very strong case of probable injury to the rights of the mortgagee must be made out, and there must be a pressing necessity for the interposition of the court; and if, as in this case, a decree has been rendered and a sale ordered, and the mortgagee still neglects to have it enforced,

⁴⁰ *Morris v. Branchaud*, 52 Wis. 187. See also *Mayfield v. Wright as trustee, etc.* 107 Ky. 530. 54 S. W. 864.

⁴¹ *Hollenback v. Barnard*, 94 N. Y. 342. See *Wyckoff v. Scofield*, 98 N. Y. 475, 477; *Bank of Ogdens-*

burg v. Arnold, 5 Paige Ch. (N. Y.) 38, 40; *Quincy v. Cheeseman*, 4 Sandf. Ch. (N. Y.) 405; *Morris v. Branchaud*, 52 Wis. 187.

⁴² *Shepherd v. Murdock*, 2 Molloy, 531; *Darcy v. Blake*, 1 Molloy, 247.

the emergency must be grave, and an imperative necessity for the relief be shown to exist, before a court will exercise this extraordinary jurisdiction.”⁴³

The appointment of a receiver of the rents and profits of mortgaged premises being for the purpose of enforcing the payment of the debt simply, a receiver should not be appointed to take charge of the rents and profits in those cases where the validity of the mortgage is impeached on probable grounds.⁴⁴

§ 804. Where property in possession of stranger to the foreclosure.—A court will not appoint a receiver of the rents and profits of property in the possession of a stranger to the suit;⁴⁵ and when a tenant, who is not a party to the action, is in possession, his possession will not be disturbed by the appointment of a receiver, but he may be ordered to attorn to the receiver and to pay the rent to him.⁴⁶

Where a tenant goes into possession *pendente lite*, the mortgagee will be entitled to an order requiring him to yield possession of the premises or to pay the rent from that time to the receiver; but he will have no right, in any event, to an order, especially as against the equitable rights of others, which will, in effect, vest in him the possession *nunc pro tunc*, as of a time prior to the application.⁴⁷

§ 805. Where a bill is filed to redeem.—Upon a bill to redeem, where the plaintiff is in possession of the premises,

⁴³ *Cone v. Combs*, 18 Fed. 576, 5 McCrary C. C. 651.

⁴⁴ *Leahy v. Arthur*, 1 Hog. 92; *Shepherd v. Murdock*, 2 Molloy, 531; *Darcy v. Blake*, 1 Molloy, 247.

⁴⁵ *Searles v. Jacksonville, P. & M. R. R. Co.* 2 Woods C. C. 621. See *Sea Ins. Co. v. Stebbins*, 8 Paige Ch. (N. Y.) 565. In the case of *Whorton v. Webster*, 56 Wis. 356,

this question was raised, but not passed upon.

⁴⁶ *Sea Ins. Co. v. Stebbins*, 8 Paige Ch. (N. Y.) 565. See *Bank of Ogdensburg v. Arnold*, 5 Paige Ch. (N. Y.) 38. As to the doctrine at law as regards a tenant, see *Rogers v. Humphreys*, 5 Nev. & Mann. 511, 4 Ad. & El. 299.

⁴⁷ *Zeiter v. Bowman*, 6 Barb. (N. Y.) 133.

and they are ample security for the amount admitted by him to be due, the court will not appoint a receiver of the rents and profits pending the litigation, if the insolvency of the plaintiff is not set up, or if it is alleged and denied.⁴⁸ In no case can a receiver be allowed on a bill to redeem, unless the person in possession is a party to the suit or a tenant under a party.⁴⁹

The fact that the mortgagor has a claim against the mortgagee arising out of a different transaction, which claim, if valid, is a set-off against the sum due upon the mortgage, but which is not established nor the amount thereof adjusted, will not entitle the mortgagor to a receiver of the property in the hands of the mortgagee.⁵⁰

It is thought that the purchaser at a foreclosure sale of the equity of redemption in mortgaged lands has no right, upon seeking redemption from the mortgagee, to compel the application of personal property embraced in the same mortgage to the payment of the mortgage debt, to the exoneration of the land; and the appointment of a receiver to take charge of such personal property, upon a bill filed by the purchaser to redeem the mortgaged lands, and an order for its sale and the application of the proceeds to the payment of the mortgage debt, are erroneous.⁵¹

§ 806. When rents cannot be applied under a receiver.—If a mortgage or deed of trust does not, in express terms, create a specific lien upon the rents and profits of the mortgaged property, a receiver thereof should not be appointed for the benefit of those interested in the proceeds simply upon an averment in the bill that the mortgaged estate is an inadequate security for the payment of the debt, and

⁴⁸ *Jenkins v. Hinman*, 5 Paige Ch. (N. Y.) 309.

⁴⁹ *Sea Ins. Co. v. Stebbins*, 8 Paige Ch. (N. Y.) 565.

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⁵⁰ *Bayaud v. Fellows*, 28 Barb. (N. Y.) 451.

⁵¹ *Lovelace v. Webb*, 62 Ala. 271.

that the mortgagor is insolvent;⁵² because, in the absence of a specific clause giving such a lien,⁵³ the mortgagee is not entitled to and has no lien upon the rents and profits prior to the foreclosure sale,⁵⁴ and the mortgagor, though insolvent, may collect or assign them,⁵⁵ until such time as the mortgagee becomes authorized to proceed by an action against the mortgagor to subject the property to the payment of his debt.⁵⁶

Where a mortgagee who has neglected to take a specific pledge of the rents and profits of the premises, obtains an order requiring the tenant to attorn to a receiver appointed in a foreclosure, all that he is entitled to is immediate possession of the premises as security for the payment of his debt.⁵⁷ A mortgagee becomes entitled to the rents and profits only by commencing a suit to foreclose and by procuring the appointment of a receiver, and he will then be confined to the rents and profits accruing during the pendency of the suit.⁵⁸ He does not thereby acquire a lien upon rents which have already accrued, but which have not yet come into the hands of the owner of the equity of redemption;⁵⁹ nor can the court order rents already collected and in the possession of the owner to be paid over to the receiver and applied upon

⁵² *Phoenix Mut. Life Ins. Co. v. Grant*, 3 McAr. (D. C.) 220.

⁵³ *Zeiter v. Bowman*, 6 Barb. (N. Y.) 133; *Bank of Ogdensburg v. Arnold*, 5 Paige Ch. (N. Y.) 38. See *Wyckoff v. Scofield*, 98 N. Y. 475; *Argall v. Pitts*, 78 N. Y. 239.

⁵⁴ *Marshall & Ilsley Bank v. Cady*, 76 Minn. 112, 78 N. W. 978.

Where a mortgagee has neglected to take a specific pledge of the rents and profits of the premises for the security of his debt, he has no equitable right to them as against the assignee of a chattel mortgage, given by the tenant to the mort-

gagor to secure the payment of the rent. *Zeiter v. Bowman*, 6 Barb. (N. Y.) 133.

⁵⁵ See *Syracuse Bank v. Tallman*, 31 Barb. (N. Y.) 201; *Shotwell v. Smith*, 3 Edw. Ch. (N. Y.) 588; *Hughes v. Hatchett*, 55 Ala. 631.

⁵⁶ See *Jacobs v. Gibson*, 9 Neb. 380.

⁵⁷ *Zeiter v. Bowman*, 6 Barb. (N. Y.) 133.

⁵⁸ *Argall v. Pitts*, 78 N. Y. 239.

⁵⁹ *Wyckoff v. Scofield*, 98 N. Y. 475; *Hollenbeck v. Donnell*, 94 N. Y. 342.

the mortgage debt,⁶⁰ because the equitable lien obtained by his appointment extends only to the unpaid rents.⁶¹

Where a mortgagee allows a mortgagor to remain in possession of the property after default, the mortgagor may hold the rents and profits to his own use, and the mortgagee cannot compel him to account for them,⁶² though the mortgaged property may have become an insufficient security.

§ 807. When receiver applied for by defendant.—A defendant is not entitled, as a matter of right, to the appointment of a receiver, even where the plaintiff, in his complaint, has asked for a receiver; and a court will not appoint a receiver on a defendant's application, if it is opposed by the plaintiff;⁶³ neither will a receiver be appointed on the application of one defendant as against another.⁶⁴

It is thought, where a receiver is denied to a defendant on his application therefor, that he can obtain the desired relief by filing a cross-complaint against his co-defendants and the plaintiff, asking for the appointment of a receiver and moving his appointment in such cross-suit.⁶⁵

§ 808. Receiver not appointed during the time allowed for redemption.—In those states where it is provided by

⁶⁰ *Wyckoff v. Scofield*, 98 N. Y. 475; *Rider v. Bagley*, 84 N. Y. 461; *Howell v. Ripley*, 10 Paige Ch. (N. Y.) 43.

⁶¹ *Wyckoff v. Scofield*, 98 N. Y. 475; *Rider v. Bagley*, 84 N. Y. 461; *Argall v. Pitts*, 78 N. Y. 239; *Mitchell v. Bartlett*, 51 N. Y. 447; *Astor v. Turner*, 11 Paige Ch. (N. Y.) 436, 43 Am. Dec. 766; *Howell v. Ripley*, 10 Paige Ch. (N. Y.) 43; *Lofsky v. Maujer*, 3 Sandf. Ch. (N. Y.) 69.

⁶² *Dow v. Memphis & L. R. R. R. Co.* 20 Fed. 768.

⁶³ *Robinson v. Hadley*, 11 Beav.

614. No costs will be given to the plaintiff under such circumstances.

⁶⁴ *Robinson v. Hadley*, 11 Beav. 614. In this case the court refused to appoint a receiver for the property in the hands of one defendant on the application of another defendant, and gave as a reason for such refusal, that it knew no instance of a receiver having been appointed upon the application of one defendant as against another defendant, prior to a hearing.

⁶⁵ *McCracken v. Ware*, 3 Sand. (N. Y.) 688.

statute that a mortgagor shall have a specified time in which to redeem the mortgaged premises from a sale made under a foreclosure, the mortgagee is not entitled to have a receiver appointed to take charge of the crops, rents and profits of the mortgaged premises during such period allowed for redemption, the mortgagor having a right to the possession of the property during that period, and the mortgagee having no interest whatever in such crops, rents and profits.⁶⁶

In Illinois, however, a receiver may be appointed during the redemption period where the security is insufficient.⁶⁷

It has been held that the Indiana statute,⁶⁸ providing for the appointment of a receiver "in actions for the foreclosure and sale of property, where it is in danger of being lost, removed or injured, or is not sufficient to discharge the debt," applies only to the time before the sale, and that while the mortgagor remains in possession of the premises during the year of redemption after the sale, a receiver should not be appointed.⁶⁹

A statutory provision that the mortgaged premises may be used by a mortgagor during the period allowed for redemption in the same manner in which they were previously used, may be waived by express contract.⁷⁰ It has been held that, under the Michigan statute,⁷¹ a clause in the mortgage giving the mortgagee possession in case of default, cannot be carried into effect by appointing a receiver in a foreclosure

⁶⁶ *White v. Griggs*, 54 Iowa, 650; *Lapham v. Ives*, 8 Rep. 6, 13 West. Jur. 357, 25 Int. Rev. Rec. 186.

⁶⁷ *Shacppi v. Bartholomae*, 217 Ill. 105, 1 L.R.A.(N.S.) 1079, 75 N. E. 447; *Boruff v. Hinkley*, 66 Ill. App. 274; *Fountain v. Walther*, 66 Ill. App. 529; *Wright v. Case*, 69 Ill. App. 535; *Pringle v. James*, 109 Ill. App. 100. See also *Stevens as adm'r etc. v. Hadfield*, 196 Ill. 253, 63 N. E. 633.

⁶⁸ Acts 1879, p. 169.

⁶⁹ *Sheek v. Klotz*, 84 Ind. 471. See also *World Building Loan & Investment Co. v. Marlin*, 151 Ind. 630, 52 N. E. 198.

⁷⁰ *Edwards v. Woodbury*, 1 McCr. C. C. 429, 3 Fed. 14.

⁷¹ Comp. L. § 6263. This statute excludes the mortgagee from possession until he acquires an absolute title.

until after default; and that, even then, it will be a matter of discretion.⁷²

Under the Oregon statute, which provides that "a mortgage of real property shall not be deemed a conveyance so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale according to law," a mortgagee is not entitled to the rents and profits before foreclosure.⁷³ Where a married woman mortgaged her separate property under this statute to secure the debt of her husband, and the mortgagee, before the sale of the same, to satisfy the debt, entered and took the rents without the consent of the wife, the court held that he was not entitled to credit the same on the husband's debt, but was liable to the wife as for the use and occupation of the premises.⁷⁴

§ 809. Receivers as between different mortgagees.—Subsequent mortgagees are entitled to the appointment of a receiver of the rents and profits of the mortgaged premises on a petition showing that the mortgaged property is of less value than the amount of the incumbrances.⁷⁵ Where an action is brought to foreclose a mortgage and all the lienholders are made parties, and a receiver is appointed upon the application of one of the mortgagees, but such appointment is not limited to any party or lien, and it afterwards appears that the appointment was, in fact, necessary for all the lienholders, the fund collected by the receiver should be treated as a part of the general security of the mortgagees, and be controlled and distributed according to their priorities.⁷⁶ But if the receiver is appointed on the motion and for the benefit of a particular lienholder, such appointment will

⁷² *Beecher v. Marquette & P. R. Mill Co.* 40 Mich. 307.

⁷³ *Teal v. Walker*, 111 U. S. 242, 28 L. ed. 415, 4 Sup. Ct. Rep. 420.

⁷⁴ *Semple v. Bank of British Columbia*, 5 Sawy. C. C. 394.

⁷⁵ *Buchanan v. Berkshire Life Ins. Co.* 96 Ind. 510. See *Goddard v. Clarke*, 81 Neb. 373, 116 N. W. 41.

⁷⁶ *Williamson v. Gerlach*, 41 Ohio St. 682. See *Anderson v. Matthews*, 8 Wyo. 513, 58 Pac. 898.

be for his benefit only;⁷⁷ but the receivership may be subsequently extended to one or more of the other liens.⁷⁸

Where the appointment is not limited to any party or lien, it is of no consequence upon whose application the appointment was made, for the fund collected by the receiver under such an appointment will not be appropriated to any particular claim. Thus, in a case where a junior mortgagee had the rents of the property applied to his mortgage to the exclusion of prior mortgagees, it was held that the appointment of a receiver was made for the benefit of this lienholder only, and where no other lienholder asked to have the receivership extended to his lien, that the rents and profits should be applied to the discharge of his debt only.⁷⁹

§ 810. Appointment of second receiver.—One appointment of a receiver does not exhaust the power of the court under the New York practice.⁸⁰ An additional receiver will not be appointed, however, unless it appears to be necessary for the protection of the interests of those desiring it.⁸¹ The fact that a receiver has already been appointed in a previous action will not necessarily interfere with the appointment of another receiver in a subsequent suit. But where a second receiver is appointed in a subsequent suit, the duties of such second receiver will be subordinate to that of the first one. When the first receiver becomes *functus officio*, the second will take the funds, or any remaining portion thereof,⁸² which may be undisposed of by the court in the litigation.⁸³

⁷⁷ *Ranney v. Peyser*, 83 N. Y. 1.

⁷⁸ *Williamson v. Gerlach*, 41 Ohio St. 682; *Anderson v. Matthews*, 8 Wyo. 513, 58 Pac. 898. See *Putnam v. Henderson*, Hull & Co. 49 App. Div. 361, 63 N. Y. Supp. 250.

⁷⁹ *Washington Ins. Co. v. Fleischauer*, 10 Hun (N. Y.) 117; *Post v. Dorr*, 4 Edw. Ch. (N. Y.) 412;

Howell v. Ripley, 10 Paige Ch. (N. Y.) 43; *Williamson v. Gerlach*, 41 Ohio St. 682.

⁸⁰ See *People v. Security Life Ins. Co.* 79 N. Y. 267.

⁸¹ *Wabash, St. L. & W. R. R. Co. v. Central Trust Co.* 22 Fed. 513.

⁸² *Bailey v. Belmont*, 10 Abb. (N. Y.) Pr. N. S. 270, 273.

⁸³ *O'Mahoney v. Belmont*, 62 N.

Where the appointment of a receiver has been completed, whether in the suit first commenced or in a subsequent one, instead of appointing another receiver for the same property, the court will usually extend the receivership of the one action over to the other.⁸⁴

The appointment of a receiver is an interlocutory proceeding from which no appeal lies,⁸⁵ and the consent of the parties to an appeal, cannot confer jurisdiction on the appellate court.⁸⁶ Where the complaint asks for the appointment of a receiver, and the court finds that a receiver should be appointed but fails to appoint one, such failure cannot be assigned as error on an appeal by the party opposed to the appointment, but only by the party asking for such receiver.⁸⁷

§ 811. No receiver where mortgagee holds legal title.—

Where the legal title to the mortgaged premises is in the mortgagee, he will not be entitled to the appointment of a receiver,⁸⁸ because he may recover possession of the estate by an action for ejectment,⁸⁹ without the aid of a court of chancery;⁹⁰ but if he has only a mortgage of the equity of redemption and the prior mortgagee is not in possession, the subsequent mortgagee may have a receiver appointed without prejudice to the right of the first mortgagee to take posses-

Y. 133, 149; *Bailey v. Belmont*, 10 Abb. (N. Y.) Pr. N. S. 270, 273.

⁸⁴ *Osborn v. Heyer*, 2 Paige Ch. (N. Y.) 342; *Lottimer v. Lord*, 4 E. D. Smith (N. Y.) 183, 191.

⁸⁵ *Wilson v. Davis*, 1 Mont. 98.

⁸⁶ *Wilson v. Davis*, 1 Mont. 98.

When the order appointing a receiver is in excess of the jurisdiction of the court, it is subject to review under the California Code, § 1068. See *LaSociété Française v. District Court*, 53 Cal. 495.

⁸⁷ *Emmons v. Keller*, 39 Ind. 178.

⁸⁸ *Williams v. Robinson*, 16 Conn. 524; *Mahon v. Crothers*, 28 N. J.

Eq. (1 Stew.) 567; *Beverley v. Brooke*, 4 Gratt. (Va.) 209; *Williamson v. New Albany R. Co.* 1 Biss. C. C. 201; *Sturch v. Young*, 5 Beav. 557; *Berney v. Sewell*, 1 Jac. & W. 647. But see *Ackland v. Gravener*, 31 Beav. 482.

⁸⁹ The action of ejectment against a mortgagor has been abolished in New York; 5 Wait Pr. 190; N. Y. Code Civ. Proc. § 1498.

⁹⁰ *Ackland v. Gravener*, 31 Beav. 484. See *Sturch v. Young*, 5 Beav. 557; *Berney v. Sewell*, 1 Jac. & W. 648; *Silver v. Bishop of Norwich*, 3 Swanst. 113 n.

sion.⁹¹ If, however, there is a subsisting equity, which, if set up at law, would lead to the trial of questions which might be tried more satisfactorily in equity, the mortgagee, having the legal estate, will be entitled to a receiver.⁹²

In *White v. Bishop of Peterborough*,⁹³ a third incumbrancer was in possession. The first incumbrance was a devise for years, to secure an annuity, and the second incumbrance was also an annuity secured for a term. On a bill filed by the second incumbrancer, Lord Eldon held that he was entitled to a receiver, inasmuch as he could not succeed in ejectment on account of a prior legal estate which might have been set up against him. And it has been held that the grantee of an annuity is entitled to a receiver as against judgment creditors, who have obtained possession under writs of *elegit* or sequestration, if there is a legal estate prior to the term securing his annuity, which bars him from proceeding at law by ejectment.⁹⁴

§ 812. No receiver where mortgagee in possession.—

It is a general rule that, as against a prior mortgagee in possession of the property, a receiver will not be allowed in favor of a subsequent mortgagee, as long as any part of the debt remains unpaid to the prior mortgagee,⁹⁵ because the prior mortgagee is entitled to retain possession until his claim is fully paid,⁹⁶ except where he refuses to accept the unpaid balance, or admits that he has probably received the full amount of his claim.⁹⁷ In the early case of *Berney v. Sewell*,⁹⁸

⁹¹ 2 Spence Eq. Jur. 689.

⁹² *Ackland v. Gravenor*, 31 Beav. 482.

⁹³ 3 Swanst. 109.

⁹⁴ *Silver v. Bishop of Norwich*, 3 Swanst. 113 n.

⁹⁵ *Patten v. The Accessory Transit Co.* 4 Abb. (N. Y.) Pr. 235. 13 How. (N. Y.) Pr. 502; *Quinn v. Brittain*, 3 Edw. Ch. (N. Y.) 314; *Bolles v. Duff*, 35 How. (N. Y.)

Pr. 481; *Rapier v. Gulf City Paper Co.* 64 Ala. 330; *Callanan v. Shaw*, 19 Iowa, 183; *Trenton Banking Co. v. Woodruff*, 3 N. J. Eq. (2 H. W. Gr.) 210; *Rowe v. Wood*, 2 Jac. & W. 553. But see *Harding v. Garber*, 20 Okl. '11, 93 Pac. 539.

⁹⁶ *Callanan v. Shaw*, 19 Iowa, 183.

⁹⁷ *Berney v. Sewell*, 1 Jac. & W. 649; *Hilcs v. Moore*, 15 Beav. 180

⁹⁸ 1 Jac. & W. 648.

the rule was stated thus: "If a man has a legal mortgage he cannot have a receiver appointed; he has nothing to do but to take possession. But if he has only an equitable mortgage, that is if the prior mortgagee is not in the possession, the other is entitled to a receiver without prejudice to his taking possession; but if he is in possession, the subsequent mortgagee cannot have a receiver; he must redeem from the prior mortgagee."⁹⁹

The rule that a receiver will not be appointed against a prior mortgagee in possession as long as anything remains unpaid on his mortgage, applies equally whether the priority is original or has been acquired subsequently to the execution of the mortgage by assignment;¹ but it applies only so long as some part of the debt remains unpaid to the mortgagee who has a right to retain the possession.²

This rule, that a receiver will not be appointed against a prior legal mortgagee in possession, has been said to apply in favor of persons in possession, entitled to a mortgage and to prior charges on the estate, though they may have applied part of the rents in payment of the interest on those charges, instead of discharging the principal of the mortgage, it being the proper course, as between a tenant for life and the owners of the inheritance, to keep down such interest out of the rents, and not to treat the surplus rents, after the payment of interest on the unpaid part of the principal, as applicable to the reduction of such principal.³

⁹⁹ See *Mahon v. Crothers*, 28 N. J. Eq. (1 Stew.) 567; *Cortleyeu v. Hathaway*, 11 N. J. Eq. (3 Stockt.) 39, 64 Am. Dec. 478; *Trenton Banking Co. v. Woodruff*, 3 N. J. Eq. (2 H. W. Gr.) 210; *Schreiber v. Carey*, 48 Wis. 213; *Hiles v. Moore*, 15 Beav. 175; *Rowe v. Wood*, 2 Jac. & W. 553.

¹ *Berney v. Sewell*, 1 Jac. & W. 648; *Hiles v. Moore*, 15 Beav. 181; *Bates v. Brothers*, 17 Jur. 1174, 2 Sm. & G. 509.

² *Codrington v. Parker*, 16 Ves. 469.

³ *Faulkner v. Daniel*, 3 Hare, 204n, 10 L. J. Ch. N. S. 33.

§ 813. Subsequent mortgagee redeeming from prior mortgagee in possession.—Where a prior mortgagee is in possession, a subsequent mortgagee, to gain control of the rents, must redeem from the first mortgagee; and, in taking the account, the first mortgagee will not be allowed any sums which he may have paid to the mortgagor after notice of subsequent incumbrances.⁴ If the mortgagee in possession claims that anything is due him, the court will not take the possession away from him; and so long as anything remains unpaid, the court cannot substitute another security for that for which the mortgagee contracted.⁵ The only course is to pay him off according to his own statement of the debt,⁶ particularly where it appears that the mortgaged premises are an inadequate security for the balance due.⁷

It is not necessary that the mortgagee in possession be able to state the exact amount due on his mortgage; it will be sufficient if he can show that anything at all is due.⁸ The incomplete state of his account will furnish no valid excuse on the part of the mortgagee in possession for not making a definite statement regarding the amount due him; if he keeps his accounts in such shape that he cannot tell, and that no one else can ascertain the amount due, the court will assume that nothing is due and will appoint a receiver.⁹ Time may be allowed the mortgagee in possession, however, in which to prepare a statement.¹⁰

If the mortgagee in possession alleges in his answer that

⁴ 2 Spence Eq. Jur. 689.

⁵ *Quinn v. Brittain*, 3 Edw. Ch. (N. Y.) 314; *Berney v. Sewell*, 1 Jac. & W. 648, 649; *Dalmer v. Dashwood*, 2 Cox Ch. 382, 383; *Bryan v. Cormic*, 1 Cox Ch. 422; *Phipps v. Bishop of Bath and Wells*, 2 Dick. 608; *Chambers v. Goldwin*, cited 13 Ves. 378; *Quarrell v. Beckford*, 13 Ves. 378.

⁶ *Bayard v. Fellows*, 28 Barb. (N. Y.) 451; *Berney v. Sewell*, 1 Jac.

& W. 648; *Rowe v. Wood*, 2 Jac. & W. 557.

⁷ *Bayard v. Fellows*, 28 Barb. (N. Y.) 451.

⁸ *Chambers v. Goldwin*, cited in 13 Ves. 378; *Quarrell v. Beckford*, 13 Ves. 378.

⁹ *Codrington v. Parker*, 16 Ves. 469; *Hiles v. Moore*, 15 Beav. 180.

¹⁰ *Codrington v. Parker*, 16 Ves. 469.

some part of the debt is due him, the court may determine the truth of the statement upon affidavits against the answer.¹¹ The statement must be a positive and distinct one; a vague assertion or a general declaration by the mortgagee that he believes that when the accounts are stated, some particular sums and parts of other sums will be found due, will not be sufficient, unless it is supported by a statement of accounts which will serve to test the truth of such assertion or declaration.¹² If the mortgagee cannot state that some definite amount is due him, the court will appoint a receiver.¹³

In *Rowe v. Wood*,¹⁴ a motion for a receiver against a mortgagee of mines, who had become a partner by purchasing shares in such mines, made upon the ground of mismanagement, was denied, it not being shown, and the mortgagee not admitting, that the mortgage was paid. It was also held in that case, that the rights and duties of a person in such a situation were not to be governed solely by principles applicable to a party who stands in the position of a mortgagee or partner; and that if a mortgagee can in any case be deprived of his possession on the ground of mismanagement, it must be mismanagement of a clear and specific nature.

§ 814. Other cases for receiver where mortgagee in possession.—A mortgagee who has been placed in possession by the mortgagor, by virtue either of a clause in the mortgage or of a subsequent agreement or consent, which may be by parol, is entitled to retain possession and to collect the rents and profits as against a purchaser at a sale under an execution issued on a judgment, the lien of which did not attach until after the mortgagee's possession had commenced.¹⁵

¹¹ *Rowe v. Wood*, 2 Jac. & W. 558.

¹² *Hiles v. Moore*, 15 Beav. 181.

¹³ *Chambers v. Goldwin*, cited in 13 Ves. 378; *Quarrell v. Beckford*,

13 Ves. 378; *Rowe v. Wood*, 2 Jac. & W. 558.

¹⁴ 2 Jac. & W. 553.

¹⁵ *Edwards v. Wray*, 11 Biss. C. C. 251, 12 Fed. 42.

But possession of the premises obtained by a mortgagee, through arrangements with a tenant of the mortgagor, whose lease has expired, without the consent of such mortgagor, is not a lawful possession and will not be a bar to the appointment of a receiver.¹⁶ And the rule that a receiver will not be appointed against a mortgagee holding the legal title, who is in the actual possession of the mortgaged property, does not apply where the party in possession holds the property under an execution issued upon a judgment.¹⁷

In order to deprive an equitable mortgagee of the right to a receiver, the possession of the party holding the property must be such as invests him with a right to receive the rents and profits. A mere possession as a tenant is not sufficient, and an incumbrancer who is in possession, not as an incumbrancer, but as a tenant, cannot set up his possession as such tenant against the appointment of a receiver.¹⁸

In a case where a second mortgagee, who had sold a part of his mortgage to a tenant in possession of the premises, applied for a receiver, and the tenant in possession objected, on the ground that the rent which he was to pay was just equal to the interest he was entitled to receive on his share of the money due on the mortgage, and that it would, therefore, merely increase his expenses by paying into court as rent what he must receive back as interest, the court held that the defendant could not unite his two characters of mortgagee and tenant, and that his possession as tenant could not be set up against the other mortgagee.¹⁹

§ 815. When a receiver will be appointed against a mortgagee in possession.—As has been seen, a receiver will not be appointed as a rule against a mortgagee in possession so long as anything remains due to him; yet, where it appears that he is irresponsible, or that the rents and

¹⁶ *Russell v. Ely*, 67 U. S. (2 Black) 575, 17 L. ed. 258.

¹⁷ Kerr on Rec. 118.

¹⁸ Kerr on Rec. 44.

¹⁹ *Archdeacon v. Bowes*, 3 Anst. 752.

profits will be lost, or are in danger of being lost, or that he is committing waste upon or a material injury to the premises, an exception will be made and a receiver will be appointed.²⁰ A receiver will also be appointed in all instances where a *prima facie* case of fraud is shown to the satisfaction of the court,²¹ or where gross mismanagement of the estate is made to appear; but to warrant such an interference, the mismanagement must be of a clear and specific nature.²²

Where liens upon a bankrupt's estate are before a court for adjustment, a receiver will be appointed on the application of his assignee, although the bankrupt may have relinquished possession to some of the prior incumbrancers.²³

§ 816. Receiver where first mortgagee out of possession.—If it appears from the bill that there is a prior mortgagee who is not in possession of the premises, it has been held that the court may, at the instance of subsequent incumbrancers, appoint a receiver in the absence of the prior mortgagee, even where the mortgagor is out of the jurisdiction of the court; but such an appointment will, of course, be made without prejudice to the right of the first mortgagee to take possession of the premises at any time he may desire.²⁴

²⁰ *Bolles v. Duff*, 35 How. (N. Y.) Pr. 481; *Williams v. Robinson*, 16 Conn. 517; *Beverley v. Brooke*, 4 Gratt. (Va.) 209; *Meaden v. Sealey*, 6 Hare, 620; *Codrington v. Park*, 16 Ves. 469; *Lloyd v. Passingham*, 16 Ves. 59; *Hugonin v. Basely*, 13 Ves. 105.

²¹ *Corcoran v. Doll*, 35 Cal. 476; *Kipp v. Hanna*, 2 Bland Ch. (Md.) 26; *Hugonin v. Basely*, 13 Ves. 105; *Lloyd v. Passingham*, 16 Ves. 59.

²² *Rowe v. Wood*, 2 Jac. & W. 553.

²³ *McLean v. Lafayette Bank*, 3 McL. C. C. 503, 2 West. L. J. 441.

²⁴ *Dalmer v. Dashwood*, 2 Cox

Ch. 378-383; *Bryan v. Cormick*, 1 Cox Ch. 423; *Phipps v. Bishop of Bath*, 2 Dick. 608; *Berney v. Sewell*, 1 Jac. & W. 647-649; *Tanfield v. Irvine*, 2 Russ. 151. But see *Holmes v. Bell*, 2 Beav. 298; *Browne v. Blounte*, 2 Russ. & M. 83; *Anderson v. Stather*, 2 Coll. 209; *Rhodes v. Mostyn*, 17 Jur. 1007; *Coope v. Creswell*, 12 W. R. 299.

In *Phipps v. Bishop of Bath and Wells*, 2 Dick 608, Lord Thurlow refused to appoint a receiver at the instance of a second mortgagee, the first one not being in possession; but in *Bryan v. Cormick*, 1 Cox Ch.

If there are prior outstanding mortgages, but the mortgagees are not in possession, or refuse to take possession, the court may appoint a receiver of the mortgaged premises at the instance of subsequent mortgagees or judgment creditors, without prejudice to the right of the prior mortgagees to take possession.²⁵ But a court will not allow a prior legal incumbrancer to object to the appointment of a receiver except by the assertion of his legal rights and by taking possession of the premises himself.²⁶

§ 817. Receiver appointed upon the application of junior mortgagee.—The appointment of a receiver may be made at the suit of a junior mortgagee, or other legal incumbrancer, for the purpose of keeping down the interest, even though the applicant may be unable, at the time, to enforce the usual mortgagee's remedies, as where he has covenanted not to call in the mortgage debt during a certain time.²⁷ And the court may, in a suit by a junior mortgagee, appoint a receiver, although the first mortgagee may, by his

422, he came to the conclusion that a subsequent mortgagee is entitled to have a receiver when the first mortgagee is not in possession. A similar order was made in *Dalmer v. Dashwood*, 2 Cox Ch. 378. In *Langton v. Langton*, 7 De G. M. & G. 30, a receiver was appointed at the suit of a junior incumbrancer, the first legal incumbrancer not being entitled to take possession, because he was, by the terms of his security, obliged before doing so, to give three month's notice after default made in the payment of the mortgage money. In the early case of *Phipps v. Bishop of Bath and Wells*, 2 Dick, 608, where the first mortgagee was not in possession, a receiver was refused, Lord Thurlow, saying: "A second

mortgagee, the mortgagor living, cannot have a receiver without the consent of the first mortgagee, because the court cannot prevent the first mortgagee from bringing an ejectment against the receiver as soon as he is appointed." But the later cases, given above, have established the rule as stated in the text. See also *Cortleyeu v. Hathaway*, 11 N. J. Eq. (3 Stockt.) 39, 42, 64 Am. Dec. 478; *State of Maryland v. North Cent. R. R. Co.* 18 Md. 193.

²⁵ *Rhodes v. Mostyn*, 17 Jur. 1007; *Bryan v. Cormick*, 1 Cox Ch. 422.

²⁶ *Wiswall v. Sampson*, 55 U. S. (14 How.) 65, 14 L. ed. 322; *Silver v. Bishop of Norwich*, 3 Swanst. 112n.

²⁷ *Burrows v. Malloy*, 2 Jac. & LaT. 521.

mortgage, have the power to appoint one.²⁸ But the appointment will always be without prejudice to the rights of every prior mortgagee, and the receiver will be directed by the order appointing him to keep down the interest upon all prior incumbrances.²⁹

If the interest is in arrears, such arrearage will be a sufficient cause for the appointment of a receiver at the suit of a junior mortgagee incumbrancer.³⁰ But where, as between two equitable incumbrancers, the one later in date has acquired the legal possession of the premises, the court will not appoint a receiver at the instance of the one who was prior in date.³¹

It is said to be a well established rule that a mortgagee obtains a specific lien upon rents and profits by diligently securing the appointment of a receiver, and a second or other subsequent mortgagee may thus secure an advantage over the first mortgagee as to the rents collected,³² even though the first mortgagee may not receive from the foreclosure sale a sufficient amount to discharge his mortgage debt. But this rule is said to apply only to those cases where the first mortgagee is not a party to the suit.³³

§ 818. Receiver when junior mortgagee in possession.—If a subsequent incumbrancer is in possession of

²⁸ *Bord v. Tollemache*, 1 N. R. 177.

²⁹ *Cortleyeu v. Hathaway*, 11 N. J. Eq. (3 Stockt.) 42, 64 Am. Dec. 478.

³⁰ *White v. Bishop of Petersburg*, 3 Swanst. 109; *Tanfield v. Irvine*, 2 Russ. 151; *Wilson v. Wilson*, 2 Keen, 249; *Hopkins v. Worcester and Birmingham Canal Co.* L. R. 6 Eq. 437.

³¹ *Bates v. Brothers*, 17 Jur. 1174.

³² *Post v. Dorr*, 4 Edw. Ch. (N. Y.) 412; *Abrahams v. Berkowitz*, 146 App. Div. 563, 131 N. Y. Supp.

257; *Kroehle v. Ravitch*, 148 App. Div. 54, 132 N. Y. Supp. 1056. See *Anderson v. Matthews*, 8 Wyo. 513, 58 Pac. 898; *Warner v. Gouverneur*, 1 Barb. (N. Y.) 36; *Washington Life Ins. Co. v. Fleischauer*, 10 Hun (N. Y.) 117; *Astor v. Turner*, 11 Paige Ch. (N. Y.) 436, 43 Am. Dec. 766; *Howell v. Ripley*, 10 Paige Ch. (N. Y.) 43; *Thomas v. Brigstocke*, 4 Russ. 64. See also *Madison Trust Co. v. Axt*, 146 App. Div. 121, 130 N. Y. Supp. 371.

³³ *Howell v. Ripley*, 10 Paige Ch. (N. Y.) 43; *Miltenberger v. Logans-*

property and a prior legal incumbrancer cannot recover possession by an ejectment, a receiver may be appointed.³⁴ Where a second mortgagee forecloses and buys in the premises for less than the amount of his mortgage debt, and takes possession as purchaser, and the premises are doubtful security for the first mortgage, the first mortgagee may, in an action to foreclose his mortgage, have a receiver appointed, who will be required to account to such purchaser for any balance that may remain after satisfying the first mortgage.³⁵

Where, in an action for foreclosure, a junior mortgagee was appointed receiver with power to keep the buildings insured and in repair and "to pay ground rent and taxes," and subsequently a prior mortgagee foreclosed and bought in the premises for less than his claim, the receiver, having paid the ground rent to the date of the sale, was held to be entitled to appropriate the balance in his hands to the discharge of his mortgage, and could not be required to pay the taxes from the fund.³⁶ A third mortgagee, who advances money to buy up a first incumbrance, cannot retain the property as against a second mortgagee, after the first mortgage has been paid off, if he had notice of the existence of such second mortgage.³⁷

§ 819. General practice in appointing receiver.—Where the plaintiff avers that the security for the mortgage debt is insufficient, and the mortgagor or the party personally liable for the payment of the debt is insolvent, the mortgagee will be entitled to apply for a receiver of the rents and profits of the mortgaged premises at any time during the progress of

port R. Co. 106 U. S. (16 Otto) 286, 27 L. ed. 117, 1 Sup. Ct. Rep. 140; High on Rec. § 688.

³⁴ *Silver v. Bishop of Norwich*, 3 Swanst. 116n.

³⁵ *New York Life Ins. Co. v. Glass*, 50 How. (N. Y.) Pr. 88.

³⁶ *Ranney v. Peyser*, 83 N. Y. 1, reversing 20 Hun (N. Y.) 11.

³⁷ *Hiles v. Moore*, 15 Beav. 175, 181.

the cause,³⁸ and will, even before the hearing,³⁹ be entitled to a receiver as a matter of right, unless the party in possession, or the person liable for the payment of the deficiency, gives a sufficient undertaking to account for the rents and profits in case of a deficiency.⁴⁰ A receiver may be appointed even after a voluntary assignment by a mortgagor for the benefit of his creditors.⁴¹

While a receiver may be appointed, either upon the application of the plaintiff, or upon the motion of the court in a case justifying it, yet one will not be appointed on the application of a mere stranger having no connection with or interest in the subject matter of the litigation.⁴²

§ 820. Time of appointing receiver.—A court of chancery has no power to appoint a receiver prior to the filing of a bill and the beginning of an action,⁴³ nor without notice to the parties interested in the property to be delivered into the receiver's hands;⁴⁴ an order to show cause why a receiver should not be appointed, served before the action is commenced, is irregular.⁴⁵ It has long been held that a receiver should not be applied for prior to the service of the summons,⁴⁶ unless, perhaps, where the defendant designedly keeps without the jurisdiction of the court, or in hiding, to avoid

³⁸ *Lofsky v. Maujer*, 3 Sandf. Ch. (N. Y.) 69; *Hardy v. McClellan*, 53 Miss. 507; *Whitehead v. Wooten*, 43 Miss. 523; *Brown v. Chase*, Walk. Ch. (Mich.) 43.

³⁹ *Brinkman v. Ritzinger*, 82 Ind. 364. See *Frelinghuysen v. Colden*, 4 Paige Ch. (N. Y.) 204; *Caslin v. State*, 44 Ind. 151.

⁴⁰ *Syracuse Bank v. Tallman*, 31 Barb. (N. Y.) 201. See *Warner v. Gouverneur*, 1 Barb. (N. Y.) 36; *Shotwell v. Smith*, 3 Edw. Ch. (N. Y.) 588; *Astor v. Turner*, 11 Paige Ch. (N. Y.) 436; *Howell v. Ripley*, Mortg. Vol. II.—75.

10 Paige Ch. (N. Y.) 43; *Sea Ins. Co. v. Stebbins*, 8 Paige Ch. (N. Y.) 565; *Main v. Ginthert*, 92 Ind. 180; *Myers v. Estell*, 48 Miss. 372.

⁴¹ *Upham v. Lewis*, 1 Law Bull. 86.

⁴² *O'Mahoney v. Belmont*, 62 N. Y. 133. See *Attorney-General v. Day*, 2 Madd. 246.

⁴³ *Crowder v. Moone*, 52 Ala. 220.

⁴⁴ *Jones v. Schall*, 45 Mich. 379.

⁴⁵ *Kattenstroth v. Astor Bank*, 2 Duer (N. Y.) 632.

⁴⁶ *Stratton v. Davidson*, 1 Russ. & Myl. 484

service of the process,⁴⁷ because a court has no jurisdiction to deprive a party, who is not present to defend himself, of the possession of his estate.⁴⁸ A receiver should not be appointed before final judgment, merely because of a concurrent demand by two or more parties to the action.⁴⁹

§ 821. Appointment of receiver before answer.—The general rule is, that a receiver will not be appointed before the defendant answers, especially if one is not asked for in the complaint, unless it clearly appears that the property is in danger of loss or injury by reason of the insolvency of the party having possession of it, or from other causes.⁵⁰ And where a receiver is appointed before the answer is served, he may afterwards be discharged on the defendant's motion, if the complaint and answer taken together show that a receiver should not have been appointed.⁵¹

It was formerly held not to be proper to move for a receiver upon the pleadings and affidavits in the action before the hearing on the trial.⁵² The present doctrine, however, is that after an action for foreclosure has been commenced, the plaintiff may, if the security is in jeopardy, sequester the rents or emblements or both through the aid of a receiver, at any time during the progress of the action; but that the receiver is not entitled to recover rents collected nor the value of emblements enjoyed prior to the date of his appointment.⁵³

To authorize the appointment of a receiver before the hearing, the complaint must contain a prayer for such appoint-

⁴⁷ *Quinn v. Gunn*, 1 Hog. 75; *Malcolm v. Montgomery*, 2 Molloy, 500; *Maguire v. Allen*, 1 Ball & B. 75; *Coward v. Chadwick*, 2 Russ. 150 n. See 1 VanSant. Eq. Pr. 402.

⁴⁸ *Tanfield v. Irvine*, 2 Russ. 151.

⁴⁹ *Dusenbury v. Dusenbury*, 11 Daly (N. Y.) 112.

⁵⁰ *People v. Mayor of N. Y.* 8

Abb. (N. Y.) Pr. 7; *West v. Swan*, 3 Edw. Ch. (N. Y.) 420.

⁵¹ *Phoenix Mut. Life Ins. v. Grant*, 3 McAr. D. C. 220.

⁵² *Lloyd v. Passingham*, 3 Meriv. 697.

⁵³ *Hamilton v. Austin*, 36 Hun (N. Y.) 138.

ment.⁵⁴ A receiver will be appointed after a hearing or after a rehearing, even though such appointment may have been once refused, upon showing a new state of facts such as to justify the appointment.⁵⁵

§ 822. Appointment of receiver after granting decree.—

After a decree of foreclosure has been granted, the court may appoint a receiver, although not asked for in the complaint,⁵⁶ where such appointment is necessary to protect the interests of the mortgagee;⁵⁷ the fact that the complaint does not state facts authorizing the appointment of a receiver, constitutes no objection to an application well supported on the merits.⁵⁸

If a trustee, appointed by a final decree, refuses the trust a receiver may be appointed to protect the interests of all the parties interested in the state.⁵⁹ And where a receiver has been properly appointed in a suit for the foreclosure of a mortgage, it will be no error to continue the receivership after the final decree of sale.⁶⁰

Although a mortgagor may be entitled to hold the legal title to the premises until the foreclosure sale, yet in a proper case, and when necessary to protect the mortgagee's interests, equity will appoint a receiver; and his appointment may be made by an order in the foreclosure even after judgment.⁶¹ But an order appointing a receiver of rents and profits after

⁵⁴ *Cook v. Gwyn*, 3 Atk. 689; *Meredith v. Wyse*, 1 Molloy, 2.

⁵⁵ *Attorney-General v. Mayor of Galway*, 1 Molloy, 95.

⁵⁶ *Cook v. Gwyn*, 3 Atk. 689; *Meredith v. Wyse*, 1 Molloy, 2.

⁵⁷ *Haas v. Chicago Building Soc.* 89 Ill. 498; *Schreiber v. Carey*, 48 Wis. 208. In *Schreiber v. Carey*, *supra*, the court say: "Although, by the laws of this state, the mortgagor of lands holds the legal title until the foreclosure sale, yet in a proper

case, when necessary to protect the mortgagee's interests, equity will appoint a receiver; this may be done by an order in the foreclosure suit after judgment; and the fact that the complaint does not state facts authorizing the appointment, is no objection in such a case."

⁵⁸ *Schreiber v. Carey*, 48 Wis. 208.

⁵⁹ *Wilson v. Russ*, 17 Fla. 691.

⁶⁰ *Buchanan v. Berkshire L. Ins. Co.* 96 Ind. 510.

⁶¹ *Schreiber v. Carey*, 48 Wis. 208.

a final decree of foreclosure and sale, should not be granted without notice; yet if a party voluntarily appears and resists the application for a receiver, notice thereof will be deemed to have been waived.⁶²

§ 823. Appointment of receiver after sale.—Inasmuch as the necessity for the appropriation of the rents and profits to the payment of the mortgage debt frequently does not appear until after the sale, a receiver to collect them may be appointed by the court after the sale upon a proper showing of the facts and circumstances,⁶³ or where it clearly appears that the rights of the purchaser have been impaired or are likely to be impaired by the possession of the mortgagor. The reason for this would seem to be that the security is not exhausted by the sale, for there is also a fund included in it which is secondarily liable,—the rents and profits. The power of appointing a receiver after a sale, however, should be exercised only in extreme cases and to prevent gross wrong and injustice.⁶⁴

It has been said that where a mortgagee completes his foreclosure without sequestrating the rents and profits, he cannot afterwards, on finding the property insufficient security, have the rents and profits applied to the payment of his debt, because his right to intercept such rents and profits ceases with the completion of the foreclosure;⁶⁵ but the better doctrine is thought to be that a receiver may be appointed

⁶² *Haas v. Chicago Building Soc.* 89 Ill. 498.

⁶³ *Smith v. Tiffany*, 13 Hun (N. Y.) 671; *Astor v. Turner*, 11 Paige Ch. (N. Y.) 436, 43 Am. Dec. 766; *Haas v. Chicago Building Soc.* 89 Ill. 498; *Connelly v. Dickson*, 76 Ind. 440; *Adair v. Wright*, 16 Iowa, 385; *Schreiber v. Carey*, 48 Wis. 208; *Thomas v. Davies*, 11 Beav. 29. In Indiana the old equity rule governing this subject was embodied

in and re-enacted by 2 Ind. Rev. Stat. 144, § 199, chap. 6.

⁶⁴ *Haas v. Chicago Building Soc.* 89 Ill. 498. See *Astor v. Turner*, 11 Paige Ch. (N. Y.) 436, 43 Am. Dec. 766; *Smith v. Tiffany*, 13 Hun (N. Y.) 671; *Adair v. Wright*, 16 Iowa, 385; *Schreiber v. Carey*, 48 Wis. 208; *Thomas v. Davies*, 11 Beav. 29.

⁶⁵ *Foster v. Rhodes*, 10 Bankr. Reg. 523.

after the granting of a decree or even after a sale, where such appointment is necessary to protect the interests and to preserve the rights of the parties to the action.⁶⁶

§ 824. Interference with receiver's possession.—The possession of a receiver appointed in a mortgage foreclosure is not to be disturbed without leave of the court making the appointment,⁶⁷ and all claims adverse to such receiver are to be determined by the court appointing him.⁶⁸ But, although the courts will prevent any disturbance of a receiver in possession under an order of sequestration, yet they generally refuse to interfere as against the legal title.⁶⁹

The court, when appealed to, will examine the title and discharge the receiver, or leave the party claiming the possession under a superior legal title, to enforce his rights by an action at law.⁷⁰

§ 825. Remedy of parties claiming title paramount to receiver.—Where a receiver has been appointed in a mortgage foreclosure and a party claims a paramount title to the estate, the remedy of the receiver is to apply to the court to direct the claimant to exhibit interrogatories in order that

⁶⁶ *Russell v. Bruce*, 159 Ind. 553, 64 N. E. 602. See *White v. Mackey*, 85 Ill. App. 282; *Walker v. Kersten*, 115 Ill. App. 130. See also *National Fire Ins. Co. of Hartford v. Broadbent*, 77 Minn. 175, 79 N. W. 676.

⁶⁷ *Foster v. Townshend*, 2 Abb. (N. Y.) N. C. 29, 36. See *Sea Ins. Co. v. Stebbins*, 8 Paige Ch. (N. Y.) 565; *Angel v. Smith*, 9 Ves. 336, 338; *Brooks v. Greathed*, 1 Jac. & W. 176, 178; *Pelham v. Dutchess of Newcastle*, 3 Swanst. 289, 293 n, 1 Story Eq. Jur. (11th ed.) § 33a; *Daniels Ch. Pr.* 1579.

⁶⁸ *O'Mahoney v. Belmont*, 62 N.

Y. 133, 149. See *Milwaukee & St. P. R. R. Co. v. Milwaukee & M. R. R. Co.* 20 Wis. 165, 88 Am. Dec. 735; *Peale v. Phipps*, 55 U. S. (14 How.) 368, 374, 14 L. ed. 459.

⁶⁹ *Foster v. Townshend*, 2 Abb. (N. Y.) N. C. 29, 37. See *Tyson v. Fairclough*, 2 Sim. & S. 142, *Jeremy Eq. Jur.* 252.

⁷⁰ *Foster v. Townshend*, 2 Abb. (N. Y.) N. C. 29, 37. See *Angel v. Smith*, 9 Ves. 336, 338; *Dixon v. Smith*, 1 Swanst. 457; *Attorney-General v. Coventry*, 1 P. Wm. 306; *Empringham v. Short*, 3 Hare, 461 *Gilb. For Roman.* 81.

he may be examined *pro interesse suo*,⁷¹ as to his title to the estate.⁷²

Anyone interfering with a receiver in possession without first obtaining leave of the court which appointed him, must either come into court and be examined *pro interesse suo*,⁷³ or apply to the court for leave to enforce his legal rights by bringing an action in ejectment;⁷⁴ in either case the application may be made by motion,⁷⁵ or on petition; a petition is probably the most convenient practice.⁷⁶

§ 826. Appeal—Continuance of receivership.—In *McMahon v. Allen*,⁷⁷ an order directing the continuance of a receivership during the pendency of an appeal, which was to be taken from the final decree, was held to continue the

⁷¹ Though it was formerly questioned [see *Kaye v. Cunningham*, 5 Madd. 406], it now appears to be settled, that the party for whose benefit the receivership was had, may require the party claiming an adverse right or title, to come in and show cause why he should not be examined *pro interesse suo*. *Foster v. Townshend*, 2 Abb. (N. Y.) N. C. 29, 37. See *Johnes v. Claughton*, Jac. 573; *Brooks v. Greathed*, 1 Jac. & W. 573; *Hamlyn v. Lee*, 1 Dick. 94.

⁷² *Wiswall v. Sampson*, 55 U. S. (14 How.) 52, 65, 14 L. ed. 322, 3 Dan. Ch. Pr. 1984.

⁷³ *Wiswall v. Sampson*, 55 U. S. (14 How.) 52, 65, 14 L. ed. 322. Regarding the practice in such cases, see *Hamlyn v. Lee*, 1 Dick. 94; *Gomme v. West*, 2 Dick. 472; *Hunt v. Priest*, 2 Dic. 540; *Anon.* 6 Ves. 287.

⁷⁴ *Green v. Winter*, 1 Johns. Ch. (N. Y.) 60, 7 Am. Dec. 475; *Bryan v. Cormick*, 1 Cox Ch. 422; *Angel v.*

Smith, 9 Ves. 335, 2 Spence Eq. Jur. 647.

⁷⁵ *Brooks v. Greathed*, 1 Jac. & W. 179, note; *Dickinson v. Smith*, 4 Madd. 177; *Walker v. Bell*, 2 Madd. 21; *Dixon v. Smith*, 1 Swanst. 457.

⁷⁶ *Brooks v. Greathed*, 1 Jac. & W. 178, 2 Spence Eq. Jur. 699. Where it is made to appear to the satisfaction of the court that the claimant has a superior right or title to the sequestration, the receiver will be discharged as to him. *Foster v. Townshend*, 2 Abb. (N. Y.) N. C. 29, 36; *Attorney-General v. Coventry*, 1 P. Wm. 306, 309, note; *Wharam v. Broughton*, 1 Ves. Sr. 181, 3 Dan. Ch. Pr. 1269, 1270, 1271, and such orders will be made as the rights of all parties in interest may require. *Field v. Jones*, 11 Ga. 413; *Angel v. Smith*, 9 Ves. 335, 338, 2 Story Eq. Jur. (11th ed.) §§ 833, 891.

⁷⁷ 14 Abb. (N. Y.) Pr. 220.

receiver's authority not only during the appeal to the general term, but also during an appeal to the court of appeals.

In *Rider v. Bagley*,⁷⁸ it was held that where fraud or contempt upon the supreme court is charged upon the owner, for collecting rents with a knowledge of the pendency of an application for a receiver, it is for the court to deal with the charge, and its action in the matter will not be subject to review on appeal. Assuming that the court has power to compel such owner to pay the rents to the receiver after his appointment, it seems that the exercise of such power is in the discretion of the court, and consequently not reviewable.⁷⁹

§ 827. **Accounting of receivers.**—While a receiver is at all times liable for an accounting, he can be called upon for an accounting only by the court which appointed him;⁸⁰ and an order directing him to deliver the property to another court will not relieve him from the control of the appointing court and its power to compel him to settle.⁸¹ The accounting of a receiver is to be made to the court only; he cannot be compelled to show his books to a party to the suit.⁸² A report upon a receiver's account cannot be excepted to and need not be confirmed;⁸³ and where there is no claim of fraud or bad faith with reference to the accounts of a receiver, he cannot be compelled to pay the costs of a reference to settle the same.⁸⁴

A mortgagee who has purchased the mortgaged premises at a foreclosure sale, not being entitled to any of the rents and profits which accrued prior to the time of his purchase, cannot require a receiver to account therefor until they have been collected.⁸⁵ If there are two or more mortgagees, and

⁷⁸ 84 N. Y. 461.

⁷⁹ *Rider v. Bagley*, 84 N. Y. 461.

⁸⁰ *Conkling v. Butler*, 4 Biss. C. C. 22.

⁸¹ *Mabry v. Harrison*, 44 Tex. 286.

⁸² *Musgrove v. Nash*, 3 Edw. Ch. (N. Y.) 172.

⁸³ *Brower v. Brower*, 2 Edw. Ch. (N. Y.) 621.

⁸⁴ *Radford v. Folsom*, 55 Iowa, 276.

⁸⁵ *Pendola v. Alexanderson*, 67 Cal. 337.

a receiver is appointed for the benefit of all the parties to the action, the fund collected by the receiver will be subject to whatever disposition may appear to the court to be most equitable under the circumstances of the case.⁸⁶

But it has been held that where, in an action brought to foreclose a mortgage, a subsequent incumbrancer who is made a party defendant thereto, appeals in his own behalf and secures the appointment of a receiver of the rents and profits of the mortgaged premises, he will be entitled to retain the amount collected by the receiver as against the claim of a prior mortgagee whose debt, the amount realized upon the sale of the mortgaged property under the judgment entered in the action, has been insufficient to satisfy,⁸⁷ because a junior incumbrancer cannot be divested of his right to the rents and profits in favor of the party holding the first mortgage, until such party procures the appointment of a receiver to collect them for his benefit and to subordinate them to his own superior rights.⁸⁸

In the case of *Post v. Dorr*,⁸⁹ it was held "to be an established rule, that a second or third mortgagee who succeeds in getting a receiver appointed, becomes thereby entitled to the rents collected during the appointment, although a prior mortgagee steps in and obtain a receivership in his behalf and fails to obtain enough out of the property to pay his debt. This

⁸⁶ *Keough v. McManus*, 34 Hun (N. Y.) 521. In this case an action was brought by the plaintiff to foreclose a mortgage given by the defendants, McManus and his wife, and a receiver of the rents, issues and profits of the premises was appointed. Upon the sale a sufficient amount was realized to discharge the amount due to the plaintiff, together with the costs, and to leave a surplus, which was applied upon a second mortgage given by the said McManus, and which, when so applied, still left an amount unpaid

thereon. There was a balance of rents collected and in the hands of the receiver amount to more than enough to pay the sum remaining due. The court directed that the amount due should be paid to the holder of the second mortgage, and the balance to the mortgagor.

⁸⁷ *Washington Life Ins. Co. v. Fleischauer*, 10 Hun (N. Y.) 117.

⁸⁸ See *Washington Life Ins. Co. v. Fleischauer*, 10 Hun (N. Y.) 117; *Howell v. Ripley*, 10 Paige Ch. (N. Y.) 43.

⁸⁹ 4 Edw. Ch. (N. Y.) 412, 414.

is on the principle that a mortgagee acquires a specific lien upon the rents by the appointment of a receiver of them; and if he be a second or third incumbrancer, the court will give him the benefit of his superior diligence over his senior, in respect to the rents which accrued during the time that the elder mortgagee took no measure to have the receivership extended to his suit and for his benefit."

The court of appeals of New York, *In re Maddock*,⁹⁰ say that whether a receiver appointed in a mortgage foreclosure suit to receive the rents of the mortgaged premises *pendente lite* should be required by the court to pay the expense incurred by an adjoining owner in securing an unsafe wall on the mortgaged premises, on failure of the owner and receiver so to do after notice from the fire department, is discretionary with the court appointing the receiver, and no appeal lies from its determination, for the reason that such a case is not covered by the New York Consolidation Act,⁹¹ providing for the recovery of the expense of the work done to secure an unsafe party wall, by direction of the fire department.

§ 828. Compensation of receivers.—The compensation of a receiver should be such as would be reasonable for the services rendered by a person competent to perform the duties of the office, rather than any fixed commission.⁹² What is a reasonable and proper compensation for a receiver is to be determined by proof of the facts, and not by the opinions of witnesses. Five per centum on the amount received and disbursed seems to be the customary allowance.⁹³ In New York a receiver is entitled to receive commissions at the rate prescribed by statute⁹⁴ for receiving and paying out moneys,

⁹⁰ 103 N. Y. 630, 9 N. E. 498.

⁹¹ N. Y. Acts 1882, c. 410, § 473.

⁹² See *Jones v. Keen*, 115 Mass. 170.

⁹³ *Stretch v. Gowdey*, 3 Tenn. Ch.

⁹⁴ N. Y. Code Civ. Proc. § 3320, fixes the maximum rate at five per centum, unless the commissions amount to less than one hundred dollars.

viz., one-half of the specified rate for receiving and one-half for disbursing.⁹⁵

But where a court appoints a receiver in an action pending therein, it may determine the rate of his compensation independently of the statute and with reference to the peculiar circumstances of the case.⁹⁶ A receiver is entitled to be paid his commissions out of funds in his hands,⁹⁷ or to have them taxed as costs,⁹⁸ without regard to the result of the litigation.⁹⁹

The expenses reasonably incurred by a receiver in the discharge of his trust are a lien upon the trust property prior to that of the bond holders or mortgagees.¹ Among the expenses which should be allowed to a receiver are reasonable fees for counsel employed by him in the proper discharge of his trust,² the costs of litigation and the expenses incurred in taking care of, protecting and repairing the property in his charge.³ In New York, the allowance of commissions and expenses to such a receiver is governed by the provisions of the Code of Civil Procedure.⁴

⁹⁵ *Howes v. Davis*, 4 Abb. (N. Y.) Pr. 71.

⁹⁶ *Gardiner v. Tyler*, 4 Abb. (N. Y.) Pr. N. S. 463, 3 Keyes (N. Y.) 505, 3 Trans. App. 161.

⁹⁷ *Hopfensack v. Hopfensack*, 61 How. (N. Y.) Pr. 498; *Radford v. Folsom*, 55 Iowa, 276; *Nolte v. Morgan*, 86 Kan. 823, 122 Pac. 886.

⁹⁸ *Hutchinson v. Hampton*, 1 Mon. T. 39.

⁹⁹ *Hopfensack v. Hopfensack*, 61 How. (N. Y.) Pr. 498.

¹ *McLane v. Placerville & S. V. R. Co.* 66 Cal. 606.

² *United States Trust Co. v. New York, W. S. & B. R. Co.* 101 N. Y. 478; *McLane v. Placerville & S. V. R. Co.* 66 Cal. 606. As to

when a receiver will not be allowed to charge against the fund, fees paid to counsel, see *Ranney v. Peyser*, 20 Hun (N. Y.) 11.

³ *McLane v. Placerville & S. V. R. Co.* 66 Cal. 606. See also *Ruprecht v. Muhlke, as ex'r, etc.* 225 Ill. 188, 80 N. E. 106.

⁴ N. Y. Code Civ. Proc. § 3320; *United States Trust Co. v. N. Y., W. S. & B. R. Co.* 101 N. Y. 478. The Act of 1883, chap. 378, relates to receivers of corporations appointed in proceedings in bankruptcy; a receiver appointed in an action to foreclose a mortgage executed by a corporation, is not entitled to the fees specified in said section.

Where it is determined that a receiver has been wrongfully appointed, the costs of the receivership cannot be taxed against the mortgage premises.⁵

§ 829. Removal of receivers.—A receiver appointed in a mortgage foreclosure may be removed for misconduct by the court appointing him on the application of any party interested;⁶ but where such receiver has been appointed by a court having jurisdiction of the case, no other court of coordinate jurisdiction can remove him.⁷ A receiver should not be removed without notice to the plaintiff in the action, or to the person at whose instance he was appointed.⁸ Nor should he be removed without notice, also, to all persons who have appeared in the action.⁹

§ 830. Discharge of receivers.—The appointment of a receiver in an action to foreclose a mortgage will continue during the pendency of the action, unless otherwise directed in the order appointing him.¹⁰ Where his duties have not all been performed, a receiver should not be discharged on his own application unless he shows good cause therefor, especially if his discharge might affect other parties to the action. His mere desire to be discharged, though coupled with a statement of the complication of his accounts and the necessity of losing much time in the business of his receiver-

⁵ *Joslin v. Williams*, 76 Neb. 602, 112 N. W. 343.

⁶ 1 VanSant. Eq. Pr. 382. If the person who is appointed receiver, absents himself and fails to file the bond ordered, the court may, in its discretion, remove him and appoint another. *In re Louisiana Savings Bank, etc. Co.* 35 La. An. 196.

⁷ *Young v. Montgomery & E. R. R. Co.* 2 Woods C. C. 606. See *Kennedy v. Indianapolis, C. & L. R.*

R. Co. 2 Flipp. C. C. 704, 3 Fed. 97, 11 Cent. L. J. 89, 26 Int. Rev. Rec. 30, 90, 10 Rep. 359; *Bruce v. Manchester & K. R. R. Co.* 19 Fed. 342.

⁸ *Attrill v. Rockaway Beach Imp. Co.* 25 Hun (N. Y.) 376.

⁹ See *Attrill v. Rockaway Beach Imp. Co.* 25 Hun (N. Y.) 509.

¹⁰ *Weems v. Lathrop*, 42 Tex. 207.

ship, is not sufficient.¹¹ And where the protection of the rights of a defendant requires the continuance of a receiver, the court will not grant a discharge, although the suit may be at an end; but it will require the defendant thus protected to file a bill forthwith to settle his rights.¹²

A receiver should not be discharged without notice to all interested parties, but the discharge of a receiver without notice is not necessarily such an irregularity as to justify a reversal of the order.¹³ The payment of the mortgage debt by the mortgagor, after the appointment of a receiver, does not, *ipso facto*, discharge the receiver. The receiver may have a claim for expenses incurred in the exercise of his duties which should be paid before the property held by him is taken from his possession.¹⁴

¹¹ *Beers v. Chelsea Bank*, 4 Edw. Ch. (N. Y.) 277.

¹² *Whiteside v. Prendergast*, 2 Barb. Ch. (N. Y.) 471. See *Murrough v. French*, 2 Molloy, 497;

Largan v. Bowen, 1 Sch. & Lef. 296.

¹³ *Coburn v. Ames*, 57 Cal. 201, 28 Am. Dec. 634.

¹⁴ *Crook v. Findley*, 60 How. (N. Y.) Pr. 375.

CHAPTER XXXII.

PROCEEDINGS ON SURPLUS MONEYS.

PAYING SURPLUS INTO COURT—CHARACTER OF SURPLUS, REALTY OR PERSONALTY—ADJUSTING CLAIMS AND EQUITIES—QUESTIONS OF PRIORITY—LIENS ON SURPLUS—DOWER—MECHANICS' LIENS.

- § 831. Introductory.
- § 832. Rules of court.
- § 883. Provisions of Code.
- § 834. Object of the statute and court rule.
- § 835. Payment of surplus into court.
- § 836. When surplus not paid into court.
- § 837. When surplus paid into surrogate's court.
- § 838. Paying surplus into court on foreclosure by advertisement.
- § 839. Character of surplus—Personal or real property.
- § 840. Surplus personalty, where land so converted under will.
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- § 844. Same—Assignee for benefit of creditors.
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- § 868. Priority of unrecorded mortgage over subsequent judgment.
- § 869. Second mortgage and junior judgments.
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- § 873. Satisfying judgments from surplus.
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- § 875. Judgment by confession as an indemnity.
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- § 879. Dower in surplus moneys.
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- § 881. Investment of dower in surplus—Payment of gross sum.
- § 882. Homestead right in surplus.
- § 883. Where claim of collateral assignee less than mortgage.
- § 884. Purchase of part of premises by mortgagee.
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- § 886. Mechanic's lien.
- § 887. Rights of *cestuis que trust* in surplus.
- § 888. Lien for attorney's fees on surplus.
- § 889. Disposition of surplus moneys not applied for.

§ 831. **Introductory.**—Surplus moneys in mortgage foreclosures are such moneys as remain undistributed, after the referee to sell has paid from the proceeds of the sale the costs of the suit, the expenses of the sale, the amount due for taxes and assessments, and the sum or sums found to be due on the complaint, or the complaint and the cross-bills. Thus, if the holder of a note secured by a mortgage or a deed of trust receives more than enough to pay his debt and the costs on the sale under foreclosure, the amount in excess will be surplus, for which he will be legally liable as for any other debt.¹⁵

In a case where one of several joint owners conveys his interest to the others who have given a mortgage upon the

¹⁵ *Laughlin v. Heer*, 89 Ill. 119.

whole property, and waives, in favor of their creditor, his privilege and mortgage for the purchase price upon the sale of the property to pay such mortgage debt, the creditor, after the full satisfaction of his debt, cannot apply the balance to a subsequent mortgage in his favor.¹⁶ And a mortgagee who has bid in the land on foreclosure under a judgment for more than the debt, and who, pending an action to reform the judgment, demanded and received a deed, thus electing to hold the land, is liable in an action by the person whose land was sold, and who elects to affirm the sale, for the excess of the amount of the judgment above what he was entitled to, where the judgment has been reformed, showing such excess.¹⁷

The disposition of the proceeds of the sale of the mortgaged premises on foreclosure, in paying the plaintiff and prior lienors or creditors, must be made as directed in the judgment. The referee or other officer making the sale is generally directed to retain from the proceeds of such sale a sum sufficient to pay his fees and commissions,¹⁸ together with the expenses of the sale, and including the sums paid, if any, for taxes, assessments and water rates, or to be paid to redeem the property from a sale or sales made thereunder,¹⁹ and to pay to the plaintiff or his attorney the amount of his debt, interest and costs; and if any surplus remains from the proceeds of the sale after making such payments, to pay it into court for the benefit of the persons entitled thereto.²⁰

¹⁶ *Reggio v. McCan*, 40 La. An. 479, 4 So. 478.

¹⁷ *Mitchell v. Weaver*, 118 Ind. 55, 10 Am. St. Rep. 104, 20 N. E. 525.

¹⁸ N. Y. Code Civ. Proc. §§ 3297, 3307.

¹⁹ *Cornell v. Woodruff*, 77 N. Y. 203; *Catlin v. Grissler*, 57 N. Y. 363; *Easton v. Pickersgill*, 55 N. Y. 310; *Williams v. Townsend*, 31 N.

Y. 411, 414; *Poughkeepsie Savings Bank v. Winn*, 56 How. (N. Y.) Pr. 368, N. Y. Code Civ. Proc. § 1676.

²⁰ *Beckman v. Gibbs*, 8 Paige Ch. (N. Y.) 511. See *DeForest v. Farley*, 62 N. Y. 628; *Livingston v. Mildrum*, 19 N. Y. 440, N. Y. Code Civ. Proc. § 1633; *Clark v. Carnall*, 18 Ark. 209.

The supreme court of the District of Columbia say that where land is sold by the trustees during the mortgagor's life, the surplus, after satisfying the debt, is payable to him, or, if he dies before the time of payment, to his executors, administrators, or assigns. If it is sold after his death intestate, it is payable to his heirs.²¹

The formal directions in a deed of trust as to the application of the surplus in case the property is sold to satisfy the debt are generally superfluous as the law itself directs the application.²²

§ 832. Rules of court.—The rules of the supreme court in New York provide that “all surplus moneys arising from the sale of mortgaged premises, under any judgment, shall be paid by the sheriff or referee making the sale, within five days after the same shall be received and be ascertainable, in the city of New York to the chamberlain of the said city, and in other counties to the treasurer thereof, unless otherwise specially directed, subject to the further order of the court, and every judgment in foreclosure shall contain such directions, except where other provisions are specially made by the court.”²³

The rules also provide that “on filing the report of the sale, any party to the suit, or any other person who had a lien on the mortgaged premises at the time of the sale, upon filing with the clerk where the report of sale is filed a notice, stating that he is entitled to such surplus moneys or some part thereof, and the nature and extent of his claim, may have an order of reference to ascertain and report the amount due to him, or to any other person, which is a lien upon such surplus moneys, and to ascertain the priorities of the several liens thereon; to the end that, on the coming in and confirmation of the report on such reference, such further order may

²¹ *In re Thompson*, 6 Mackey (D. C.) 536.

²² *Re Thompson*, 6 Mackey (D. C.) 536.

²³ N. Y. Supreme Court Rule 61.

be made for the distribution of the surplus moneys as may be just. The referee shall, in all cases, be selected by the court. The owner of the equity of redemption, and every party who appeared in the cause, or who shall have filed a notice of claim with the clerk, previous to the entry of the order of reference, shall be entitled to service of a notice of the application for the reference and to attend on such reference, and to the usual notices of subsequent proceedings relative to such surplus.”²⁴

“But if such claimant or such owner has not appeared, or made his claim by an attorney of this court, the notice may be served by putting the same into the post-office, directed to the claimant at his place of residence, as stated in the notice of his claim, and upon the owner in such manner as the court may direct. All official searches for conveyances or incumbrances, made in the progress of the cause, shall be filed with the judgment-roll, and notice of the hearing shall be given to any person having, or appearing to have, an unsatisfied lien on the moneys in such manner as the court shall direct; and the party moving for the reference shall show, by affidavit, what unsatisfied liens appear by such official searches, and whether any, and what other unsatisfied liens are known to him to exist.”²⁵

§ 833. Provisions of Code.—The New York Code of Civil Procedure,²⁶ provides that, “if there is any surplus of the proceeds of the sale, after paying the expenses of the sale, and satisfying the mortgage debt and the costs of the action, it must be paid into court, for the use of the person or persons entitled thereto. If any part of the surplus remains in court for the period of three months, the court must, if no application has been made therefor, and may, if an application therefor is pending, direct it to be invested at interest, for

²⁴ N. Y. Supreme Court Rule 64.

²⁶ N. Y. Code Civ. Proc. § 1633.

²⁵ N. Y. Supreme Court Rule 64.

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the benefit of the person or persons entitled thereto, to be paid upon the direction of the court.”²⁷

This section of the Code is a re-enactment of the provisions of the revised statutes,²⁸ which obviated the necessity that prevailed before their passage of ascertaining the amounts of all incumbrances and of adjudging the rights of all the defendants, before making a decree for the sale of the mortgaged premises.²⁹ Under the practice as it prevailed previous to the passage of the revised statutes and the adoption of the supreme court rule as above stated, junior incumbrancers were required to be made parties prior to the entry of the decree,³⁰ in order that they might set up their claims by answer and thereby preserve their liens upon the surplus moneys arising from the sale of the mortgaged premises.

§ 834. Object of the statute and court rule.—Under this practice it frequently happened that a mortgagee whose claim was undisputed was delayed in its enforcement, until the subsequent incumbrancers had litigated as between themselves their respective claims to the surplus. Costs being allowed to every party who appeared and answered, it not infrequently happened that the fund was greatly diminished, if not consumed, by the expenses of the litigation. This was entirely needless where the proceeds of the property were only sufficient to pay the amount of the plaintiff's claim; it was to avoid this delay and loss that the statute was enacted.³¹

²⁷ See *Dunning v. Occan Nat. Bank*, 61 N. Y. 497, 10 Am. Rep. 293; *Bergen v. Snedeker*, 8 Abb. (N. Y.) N. C. 50, 21 Alb. L. J. 54; *Mutual Life Ins. Co. v. Truchtnicht*, 3 Abb. (N. Y.) N. C. 135; *Tator v. Adams*, 20 Hun (N. Y.) 131; *Savings Bank of Utica v. Wood*, 17 Hun (N. Y.) 133; *Hurst v. Harper*, 14 Hun (N. Y.) 280; *Savings Inst. v. Osley*, 4 Hun (N. Y.) 657; *Atlantic Sav. Bank v. Hiler*, 3 Hun

(N. Y.) 209; *Oppenheimer v. Walker*, 3 Hun (N. Y.) 30.

²⁸ 2 N. Y. Rev. Stat. 192, §§ 159, 160.

²⁹ *Wheeler v. VanKuren*, 1 Barb. Ch. (N. Y.) 490; *Renwick v. Maccomb*, Hopk. Ch. (N. Y.) 277.

³⁰ *Renwick v. Maccomb*, Hopk. Ch. (N. Y.) 277. See *Kenney v. Apgar*, 93 N. Y. 546.

³¹ *Miller v. Case*, Clarke Ch. (N. Y.) 395; *Eagle Fire Ins. Co. v.*

Under the statute and the rule in mortgage foreclosures, subsequent incumbrancers who have no rights or interests adverse to those of the mortgagee, although parties to the suit, are not permitted to litigate their respective claims to the surplus as between themselves, until it is ascertained that there is a surplus.³² If there is a surplus after the sale, the defendants can then settle their claims to it by making their proofs and having their respective rights equitably determined before a referee.³³

§ 835. Payment of surplus into court.—All surplus arising from the proceeds of a mortgage foreclosure sale must be paid into court; its subsequent distribution is regulated by the rules of the supreme court.³⁴ The Code requires that the surplus of the proceeds of a sale, after the payment of the expenses thereof and the satisfaction of the mortgage debt, shall be paid into court for the use of the person or persons entitled thereto.³⁵

The supreme court rules³⁶ require "that all surplus moneys arising from the sale of mortgaged premises, under any judgment, shall be paid by the sheriff or referee making the sale, within five days after the same shall be received and be ascertainable, in the city of New York to the chamberlain of said

Flanagan, 1 How. App. Cas. (N. Y.) 311; *Farmers' Loan & Trust Co. v. Seymour*, 9 Paige Ch. (N. Y.) 538.

³² *Miller v. Case*, Clarke Ch. (N. Y.) 395; *Hubbell v. Schreyer*, 4 Daly (N. Y.) 365, 14 Abb. (N. Y.) Pr. N. S. 287; *Eagle Fire Ins. Co. v. Flanagan*, 1 How. App. Cas. (N. Y.) 311; *Drury v. Clark*, 16 How. (N. Y.) Pr. 424, 430; *Smart v. Beament*, 3 Keyes (N. Y.) 241, 4 Abb. App. Dec. (N. Y.) 253; *Farmers' Loan & Trust Co. v. Seymour*, 9 Paige Ch. (N. Y.) 538; *Union Ins*

Co. v. VanRensselaer, 4 Paige Ch. (N. Y.) 85.

³³ *Miller v. Case*, Clarke Ch. (N. Y.) 395, 399; *Union Ins. Co. v. VanRensselaer*, 4 Paige Ch. (N. Y.) 85.

³⁴ *Raht v. Attrill*, 106 N. Y. 423, 60 Am. Rep. 456, modifying 42 Hun (N. Y.) 414. N. Y. Supreme Court Rules 61, 64. For Florida rule see *Jackson v. Dutton*, 46 Fla. 513, 35 So. 74.

³⁵ N. Y. Code Civ. Proc. § 1633.

³⁶ N. Y. Supreme Court Rule 61

city and in other counties to the treasurer thereof, unless otherwise specially directed, subject to the further order of the court; and every judgment in foreclosure shall contain such directions, except where other provisions are specially made by the court. No report of a sale shall be filed or confirmed, unless accompanied by a proper voucher for the surplus moneys, and showing that they have been paid over, deposited or disposed of in pursuance of the judgment.”³⁷

A judgment creditor has a right to demand that the surplus money arising upon a foreclosure shall be brought into court;³⁸ but where he has not answered, a judgment directing the payment of the surplus moneys to him will, of course, be improper.³⁹ The assignee of a mortgage, where the assignment was made after a *lis pendens* had been filed for the foreclosure of a prior mortgage, is entitled to appear and ask that the referee pay into court the surplus shown to exist by the judgment and the report of sale, even though the referee may report a deficiency.⁴⁰ If the report of sale shows that the deficiency reported was caused by the allowance of a prior mortgage which was not authorized by the judgment, and that but for such allowance there would be a surplus, the surplus thus ascertained will be ordered to be paid into court.⁴¹

The supreme court of Louisiana, in the case of *Tessier v. Burgeois*,⁴² say that the purchaser of immovable property of an insolvent succession, sold under executory process, cannot

³⁷ N. Y. Supreme Court Rule 61. The non-payment by the sheriff to the mortgagor of the surplus received on a foreclosure sale will not defeat the sale, for the sheriff must account to the mortgagor for the money, even though the mortgagor fails to obtain it; and if the mortgagor redeems without obtaining it, he will still have an unquestionable right to have it taken into

account. *Sinclair v. Learned*, 51 Mich. 335.

³⁸ *Denton v. Nanny*, 8 Barb. (N. Y.) 620.

³⁹ *Rogers v. Ivers*, 23 Hun (N. Y.) 424.

⁴⁰ *Koch v. Purcell*, 45 N. Y. Supr. Ct. (13 J. & S.) 162.

⁴¹ *Koch v. Purcell*, 45 N. Y. Supr. Ct. (13 J. & S.) 162.

⁴² 38 La. Ann. 256.

retain the balance of the purchase price, after satisfaction of the claim of the seizing creditor, for payment of other mortgages and liens, unless there are special mortgages of inferior rank existing against the property, or unless he is threatened with eviction by the holders of general mortgages affecting the property. But in the more recent case of *Morris v. Cain*,⁴³ the court say that a purchaser at foreclosure sale under proceedings for the collection of one of a series of mortgage notes is entitled to retain the surplus beyond the amount taken under the writ of sale until it is demanded by the owners of the remainder of the series. But he is liable for interest at the rate of five per cent. per annum until such surplus is paid over or deposited.⁴⁴

It is thought the court may in certain cases require the surplus money to be invested in a given way; and where a direction is given for such investment no partial compliance with the order of court, without showing good reason for failure to render strict obedience to the order, will release from liability for failure to comply with the court's order.⁴⁵

§ 836. When surplus not paid into court.—Where the plaintiff has purchased the claims of judgment creditors and junior lienors, for whose benefit a mortgage has been executed, the surplus moneys arising on the sale under a prior mortgage will not be directed to be paid into court, as the plaintiff is entitled thereto, and the fund would only be burdened with the payment of fees and commissions by such payment into court.⁴⁶

§ 837. When surplus paid into surrogate's court.—The New York Code provides⁴⁷ that, where real property, or an interest in real property, is sold in an action or a special

⁴³ 39 La. Ann. 712, 2 So. 418.

⁴⁴ 39 La. An. 712, 2 So. 418.

⁴⁵ *Hubbard v. Elden*, 43 Ohio St. 380, 2 N. E. 434.

⁴⁶ *Hoffman v. Sullivan*, 23 N. Y. Week. Dig. 311.

⁴⁷ N. Y. Code Civ. Proc. § 2798.

proceeding to satisfy a mortgage thereon, which accrued during the decedent's life-time, and letters testamentary or letters of administration, upon the decedent's estate, were, within four years before the sale, issued from a surrogate's court of the state, having jurisdiction to grant them, the surplus moneys arising from such sale of the premises must be paid into the surrogate's court from which the letters issued. If the sale was made pursuant to the directions contained in a judgment or order, the surplus remaining after the payment of all the liens upon the property, chargeable upon the proceeds, which existed at the time of the decedent's death, must be so paid. If the sale was made in any other manner, the surplus, exceeding the lien to satisfy which the property was sold, and the costs and expenses, must, within thirty days after the receipt of the money from which it accrues, be so paid over by the person receiving that money. The receipt of the surrogate, or the clerk of the surrogate's court, or the county treasurer, as the case may be, is a sufficient discharge to the person paying the money.⁴⁸

§ 838. Paying surplus into court on foreclosure by advertisement.—Where a mortgage is foreclosed by advertisement, the "attorney or other person who receives the money upon the sale, must, within ten days after he receives it, pay into the supreme court the surplus exceeding the sum due and to become due upon the mortgage, and the costs and expenses of the foreclosure, in like manner and with like effect, as if the proceedings to foreclose the mortgage were taken in an action brought in the supreme court, triable in the county where the sale took place."⁴⁹

On the failure of the attorney, or other person receiving

⁴⁸ See *Dunning v. Ocean Nat. Bank*, 61 N. Y. 497, 19 Am. Rep. 293; *Stillwell v. Swarthout*, 10 N. Y. Wk. Dig. 369; *White v. Poillon*, 25 Hun (N. Y.) 69.

⁴⁹ N. Y. Code Civ. Proc. § 2404. See *post*, § 891.

the money on such a sale, to pay over the surplus moneys received by him, an attachment may be issued against him, in which case the burden of proving that he has paid such surplus to the county treasurer will rest upon him.⁵⁰ Where, on such a sale, the mortgagee receives the money and holds the surplus, he is regarded as a trustee for the person or persons entitled thereto, and is liable to a subsequent judgment creditor for the balance of the surplus, after deducting the amount due upon his claim, with interest from the time of the demand.⁵¹

§ 839. Character of surplus—Personal or real property.—The proceeds of the sale, after satisfying the mortgage debt, may be said to stand in the place of the equity of redemption to those who hold the title to such equity of redemption or a lien upon it.⁵² Whether such surplus is to be treated as personal property or real estate will depend upon the circumstances of each case. It is thought that when such surplus is to be distributed among persons having liens upon the land, it is for that purpose to be treated as real estate, and to be governed by the rules relating to such property.⁵³ But where the rights and claims of the persons among whom the money is to be divided are fixed and determined, the money in their hands is to be treated as personal property;⁵⁴ surplus moneys claimed by virtue of a trust are not realty, but personalty.⁵⁵

Where a person dies siezed of real estate incumbered by

⁵⁰ See *Matter of Silvernail*, 45 Hun (N. Y.) 575.

⁵¹ *Russell v. Duflon*, 4 Lans. (N. Y.) 399.

⁵² *Habersham v. Bond*, 2 Ga. Dec. 46. See *Clarkson v. Skidmore*, 46 N. Y. 297; *Snyder v. Stafford*, 11 Paige Ch. (N. Y.) 71.

⁵³ *Moses v. Murgatroyd*, 1 Johns.

Ch. (N. Y.) 119, 7 Am. Dec. 478; *Servis v. Dorn*, 76 N. J. Eq. 241, 76 Atl. 246. See *post*, § 840.

⁵⁴ See *Cope v. Wheeler*, 41 N. Y. 303.

⁵⁵ *American Life Ins. & Trust Co. v. VanEpps*, 56 N. Y. 601, reversing 14 Abb. (N. Y.) Pr. N. S. 253.

a mortgage which is thereafter foreclosed, the surplus arising on the sale is to be regarded as realty, and passes to his heirs⁵⁶ or devisees and not to his administrator;⁵⁷ his administrator cannot maintain an action to recover the surplus, although the mortgage may provide that the surplus shall be paid to the mortgageor, his executors or administrators.⁵⁸ But the rule is different where the mortgageor, or other owner of the equity of redemption, dies after the sale of the mortgaged premises has been made.⁵⁹

§ 840. **Surplus personalty, where land so converted under will.**—Although the real estate may be charged with the payment of debts by mortgage or otherwise, and is regarded as thereby converted into personal property so far as may be necessary to pay such debts, yet in the absence of a distinct intention to convert it, the whole of the real estate will not be deemed converted into personalty.⁶⁰

The surplus moneys arising from the sale of such real

⁵⁶ But see *Price v. Blankenship*, 144 Mo. 203, 45 S. W. 1123.

⁵⁷ *Matter of Knapp*, 25 Misc. 133, 54 N. Y. Supp. 727; *Kitchens v. Jones*, 87 Ark. 502, 19 L.R.A. (N.S.) 723, 128 Am. St. Rep. 36, 113 S. W. 29.

⁵⁸ *Dunning v. Ocean Nat Bank*, 61 N. Y. 497, 19 Am. Rep. 293; *American Life Ins. & Trust Co. v. VanEps*, 56 N. Y. 601; *Sweezy v. Thayer*, 11 N. Y. Leg. Obs. 50; *Graham v. Dickinson*, 3 Barb. Ch. (N. Y.) 169, 173; *Fliess v. Buckley*, 22 Hun (N. Y.) 551, 556; *Roup v. Bradner*, 19 Hun (N. Y.) 517; *Cox v. McBurney*, 2 Sandf. (N. Y.) 561; *Beard v. Smith*, 71 Ala. 568; *Kinner v. Walsh*, 44 Mo. 69; *Chaffee v. Franklin*, 11 R. I. 579; *Freedman's Savings & Trust So. v. Earle*, 110 U. S. 718, 28 L. ed. 304; *Matson v.*

Swift, 8 Beav. 374; *Bourne v. Bourne*, 2 Hare, 39; *Biggs v. Andrews*, 5 Sim. 424; *Wright v. Rose*, 2 Sim. & S. 323; *Van v. Barnett*, 19 Ves. 102; *Brown v. Bigg*, 7 Ves. 279; *Polley v. Seymour*, 2 Younge & Coll. 708. See *post*, § 860.

⁵⁹ *Denham v. Cornell*, 67 N. Y. 556; *Horton v. McCoy*, 47 N. Y. 21; *Hocy v. Kinney*, 10 Abb. (N. Y.) Pr. 400; *Foreman v. Foreman*, 7 Barb. (N. Y.) 215; *Sweezy v. Willis*, 1 Bradf. (N. Y.) 495; *Sweezy v. Thayer*, 1 Duer (N. Y.) 286; *Bogert v. Furman*, 10 Paige Ch. (N. Y.) 496; *Davison v. DeFreest*, 3 Sandf. Ch. (N. Y.) 456; *Cox v. McBurney*, 2 Sandf. (N. Y.) 561; *Smith v. Smith*, 13 Mich. 258.

⁶⁰ *Bourne v. Bourne*, 2 Hare, 35, 38.

estate stand in the place of the land for the purpose of distribution among the persons having vested interests therein or liens thereon.⁶¹ The devisees of a mortgagor are therefore entitled to the whole of the surplus moneys arising on a foreclosure sale, subject to the claims which have become liens thereon.⁶² The fact that the surplus arising from such sale is sometimes entrusted to the surrogate for distribution, will not render it personal property.⁶³

§ 841. **Massachusetts doctrine.**—The doctrine established in Massachusetts varies somewhat from that stated above. It is said in *Varnum v. Meserve*,⁶⁴ where a mortgage contains a power of sale, providing that the surplus of the proceeds after the payment of the debt and the expenses shall be paid to the mortgagor, his executors or administrators, that his executors may maintain an action for the surplus, although the mortgagor by will devised the land to others. The court recognizes the doctrine that the surplus under such circumstances is usually real estate, but claims that the legal title to the money is vested in the executor or administrator by force of the contract with the mortgagee, and that when he collects it, he holds it in trust for the heirs or devisees, as the case may be.

This case was criticised by the court of appeals of New

⁶¹ See *Clarkson v. Skidmore*, 46 N. Y. 297; *Livingston v. Mildrum*, 19 N. Y. 440; *Matthews v. Duryee*, 45 Barb. (N. Y.) 69, aff'd 4 Keyes (N. Y.) 525; *Averill v. Loucks*, 6 Barb. (N. Y.) 471; *Blydenburgh v. Northrup*, 13 How. (N. Y.) Pr. 289; *Fliess v. Buckley*, 22 Hun (N. Y.) 551; aff'd 90 N. Y. 286; *Elmendorf v. Lockwood*, 4 Lans. (N. Y.) 396; *Snyder v. Stafford*, 11 Paige Ch. (N. Y.) 71. The rights of parties in the fund are not affected by the sale, and the

court will apply the money according to the rights of the parties as they existed before the sale. *Astor v. Miller*, 2 Paige Ch. (N. Y.) 68, 76.

⁶² *Delafield v. White*, 43 Hun (N. Y.) 641, 7 N. Y. St. Rep. 301.

⁶³ *Dunning v. Ocean Nat. Bank*, 61 N. Y. 497, 19 Am. Rep. 293.

⁶⁴ 90 Mass. (8 Allen), 158, 160. See *Newhall v. Lynn Five Cent Sav. Bank*, 101 Mass. 428, 433, 3 Am. Rep. 387.

York in *Dunning v. Ocean National Bank*,⁶⁵ where it is said to be in conflict with *Wright v. Rose*,⁶⁶ in which case the contract was also made to pay the mortgagor, his "executors or administrators." The court held that "the true construction of these words undoubtedly is that the promise is to pay the executors or administrators whenever it might have been paid to the mortgagor, as for example when the land was sold in his life-time."

§ 842. **Character of surplus belonging to infant.**—It is provided by statute in New York,⁶⁷ that "a sale of real property, or of an interest in real property, other than a possibility of reverter, belonging to an infant or incompetent person, made as prescribed by the statute, does not give to the infant or incompetent person, any other or greater interest in the proceeds of the sale, than he had in the property or interest sold. These proceeds are deemed property of the same nature, as the estate or interest sold, until the infant arrives at full age, or the incompetency is removed."⁶⁸

§ 843. **Who entitled to apply for surplus.**—All liens upon or interests in the mortgaged premises, which are inferior to the mortgage sought to be foreclosed, are transferred to the surplus on the sale of the premises;⁶⁹ consequently,

⁶⁵ 61 N. Y. 497, 505, 19 Am. Rep. 293.

⁶⁶ 2 Sim. & S. 323.

⁶⁷ N. Y. Code Civ. Proc. § 2359.

This statute is said to be merely an enactment of the chancery rule as applies to sales of such property; the impress of realty which was formerly given by the rule of the court of chancery, is now given by the statute. *Forman v. Marsh*, 11 N. Y. 544, 548; *Shumway v. Cooper*, 16 Barb. (N. Y.) 556.

⁶⁸ See *Forman v. Marsh*, 11 N. Y. 544, 548, reversing *Foreman v.*

Foreman, 7 Barb. (N. Y.) 215; *Cutting v. Lincoln*, 9 Abb. (N. Y.) Pr. N. S. 436; *Shumway v. Cooper*, 16 Barb. (N. Y.) 556; *Denham v. Cornell*, 7 Hun (N. Y.) 662; *In re Thomas*, 1 Hun (N. Y.) 473, 4 T. & C. (N. Y.) 410; *Davison v. DeFreest*, 3 Sandf. Ch. (N. Y.) 456, 464; *State v. Hiron*, 1 Houst. (Del.) 252; *Nelson v. Hagerstown Bank*, 27 Md. 51; *Oberle v. Lerch*, 18 N. J. Eq. (3 C. E. Gr.) 346; *Jones v. Edwards*, 8 Jones (N. C.) L. 336.

⁶⁹ *Fagan v. People's Sav. & L.*

all persons owning such liens or interests are entitled to participate in the distribution of the surplus.⁷⁰ The plaintiff not

Assoc. 55 Minn. 437, 57 N. W. 142; *Servis v. Dorn*, 76 N. J. Eq. 241, 76 Atl. 246; *Cincinnati Cordage & Paper Co. v. Dodson Printers' Supply Co.* 131 Ga. 516, 62 S. E. 810; *Knowles v. Sullivan*, 182 Mass. 318, 65 N. E. 389. See *Matthews v. Duryee*, 45 Barb. (N. Y.) 69, 3 Abb. App. Dec. (N. Y.) 220, 17 Abb. (N. Y.) Pr. 256; *Avcrill v. Loucks*, 6 Barb. (N. Y.) 470; *Blydenburgh v. Northrop*, 13 How. (N. Y.) Pr. 289.

⁷⁰ *Field v. Hawxhurst*, 9 How. (N. Y.) Pr. 75; *Brown v. Campbell*, 100 Cal. 635, 38 Am. St. Rep. 314, 35 Pac. 433; *Kauffman v. Peacock*, 115 Ill. 212, 3 N. E. 749, *Clapp v. Hadley*, 141 Ind. 28, 50 Am. St. Rep. 308, 39 N. E. 504; *Denegre v. Mushet*, 46 La. An. 90, 14 So. 348; *Kent v. Mellus*, 69 Mich. 71, 37 N. W. 48; *Fagan v. People's Sav. & L. Asso.* 55 Minn. 437, 57 N. W. 142; *Brown v. Crookston Agricultural Assoc.* 34 Minn. 545, 26 N. W. 907; *Hooper v. Castetter*, 45 Neb. 67, 63 N. W. 135; *Blass v. Terry*, 87 Hun (N. Y.) 563, 34 N. Y. Supp. 475; *Quackenbush v. O'Hare*, 61 Hun (N. Y.) 388, 40 N. Y. S. R. 797, 16 N. Y. Supp. 33, aff'd in 129 N. Y. 485, 29 N. E. 958, 42 N. Y. S. R. 104; *Page v. Thomas*, 43 Ohio St. 38, 54 Am. Rep. 788, 1 N. E. 79; *Stewart v. Groce*, 42 S. C. 500, 20 S. E. 411; *Farmers' Loan & T. Co. v. Oregon & W. T. R. Co.* 67 Fed. 404.

Six month clause for presenting claims—Abrogation by courts.—The supreme court of the United States say that where the decree of

sale of mortgaged property provides for the payment of demands by the purchaser, and that demands which are not presented within six months after the confirmation of the sale shall be barred, and the decree of confirmation contains no such limitation as to time, a claimant may present his demands after the lapse of more than six months. *Olcott v. Headrick*, 141 U. S. 543, 35 L. ed. 851, 12 Sup. Ct. Rep. 81.

Also that where a fund arising from a sale of property is in court, the court may abrogate the limitation of six months provided by the decree of sale for the presentation of claims, and permit a creditor to prove his debt after the expiration of said six months. *Id.*

A statute providing that railroad mortgages shall be invalid against debts contracted in carrying on the business of the company, has been said not to give a prior lien to the latter's claims, but merely prevents those claiming a prior lien under a mortgage from setting it up to defeat such debts. *Farmers L. & T. Co. v. Vicksburg & M. R. Co.* 33 Fed. 778.

Same—Current debts of a company in operation of its current business are chargeable upon the current income, as against holders of mortgage bonds of the company, whether they accrued before or after appointment of a receiver. *Farmers' L. & T. Co. v. Vicksburg & M. R. Co.* 33 Fed. 778.

The supreme court of the United States say, in *St. Louis, A. & T. H. R. Co. v. Cleveland, C., C. & I. R.*

being permitted, in most cases, to allege all of his demands in his complaint, is entitled to an order of reference to enable him to assert and prove a lien junior to the mortgage foreclosed;⁷¹ otherwise such demands as are junior to the mortgage foreclosed and are not alleged in the complaint, would be cut off unless the sale was made subject to them.⁷²

The owner of a lien who was not made a party to the suit and whose lien was not cut off by the foreclosure, has no right to share in the surplus arising from the proceeds of the sale.⁷³ Consequently, a person whose claim upon the property is prior to the mortgage foreclosed, has no claim upon or right to the surplus;⁷⁴ and a senior mortgagee, or other

Co. 125 U. S. 658, 31 L. ed. 832, 8 Sup. Ct. Rep. 1011, that mortgage securities upon which current earnings of an insolvent railroad company are applied before current expenses are paid, are chargeable in equity with restoration of the fund so misapplied.

A lessee applying the earnings of the road on mortgage bonds, leaving the rent unpaid, the equity of the lessor, if it exists, is against the holder of such first-mortgage bonds, and not against the proceeds on foreclosure sale of the railroad. *St. Louis, A. & T. H. R. Co. v. Cleveland, C., C. & I. R. Co.* 125 U. S. 658, 31 L. ed. 832, 8 Sup. Ct. Rep. 1011.

And where a lessor receives, in payment of rent, more than the entire net earnings of the property, has no equitable ground for payment of the amount due for rent out of the fund arising from foreclosure sale, in preference to prior mortgages. *St. Louis, A. & T. H. R. Co. v. Cleveland, C., C. & I. R. Co.* 125 U. S. 658, 31 L. ed. 832, 8 Sup. Ct. Rep. 1011. It is thought

that to sustain the claim of an intervenor to share in the proceeds of a railroad mortgage upon coupons which he has paid to the holder, such payment must have been made upon a distinct understanding with the holders of the bonds to which such coupons belonged, that they were purchased and not discharged. *Farmers' Loan & T. Co. v. Oregon & W. T. R. Co.* 67 Fed. 404.

⁷¹ *Mutual Life Ins. Co. v. Truchtnicht*, 3 Abb. (N. Y.) N. C. 135.

⁷² *Homeopathic Mut. Life Ins. Co. v. Sixbury*, 17 Hun (N. Y.) 424. See *Wheeler v. VanKuren*, 1 Barb. Ch. (N. Y.) 490; *Roosevelt v. Elithorp*, 10 Paige Ch. (N. Y.) 415; *Tower v. White*, 10 Paige Ch. (N. Y.) 395.

⁷³ See *Emigrant Industrial Sav. Bank v. Goldman*, 75 N. Y. 127; *Bache v. Doscher*, 67 N. Y. 429; *Root v. Wheeler*, 12 Abb. (N. Y.) Pr. 294; *Winslow v. McCall*, 32 Barb. (N. Y.) 241.

⁷⁴ See *DeRuyter v. St. Peter's Church*, 2 Barb. Ch. (N. Y.) 555.

person claiming the rights of a senior mortgagee by subrogation or otherwise, has no right to participate in the surplus realized from a sale on the foreclosure of a junior mortgage.⁷⁵

In the absence of any other liens or claims, the surplus arising from the sale of mortgaged premises belongs to the mortgagor or the owner of the equity of redemption;⁷⁶ but in those cases where there has been a transfer of title by a mortgagor after a foreclosure sale, this does not transfer the right to the surplus arising on such sale.⁷⁷ And the supreme court of Ohio, in the case of *Hubbard v. Elden*,⁷⁸ say that where, on a sale of mortgaged premises, there remains in the hands of the sheriff a portion of the proceeds, and disputed claims for such balance are pending, the sheriff and his bondsmen are liable for his failure to pay the same to the rightful claimant, although not demanded until after his term expires.

§ 844. Same—Assignee for benefit of creditors.—The court of chancery of New Jersey, in the case of *Babbitt v.*

⁷⁵ *Firestone v. State*, 100 Ind. 226.

⁷⁶ *Day v. New Lots*, 107 N. Y. 148, 13 N. E. 915; *Bobbitt v. Blackwell*, 120 N. C. 253, 26 S. E. 817; *Bradburn v. Roberts*, 148 N. C. 214, 61 S. E. 617. See *Mattel v. Conant*, 156 Mass. 418, 31 N. E. 487; *Fagan v. People's Sav. & L. Asso.* 55 Minn. 437, 57 N. W. 142; *Gair v. Tuttle*, 49 Fed. 198.

Under a mortgage providing that the surplus arising from foreclosure sale be paid to the mortgagor or his assigns, the mortgagee is liable for such surplus to grantees of the mortgagor who were owners of the property at the time of the sale, notwithstanding they are strangers to the contract between the mortgagor and mort-

gagee. *Mattel v. Conant*, 156 Mass. 418, 31 N. E. 487.

The supreme court of Mississippi, in the case of *Wooldridge v. Bowmar*, 64 Miss. 34, 8 So. 233, say that where the real debtor conveyed land to an accommodation maker of notes for his benefit, in order that a mortgage might be given upon it as security for the notes, neither he, his assignee for creditors, nor a receiver of his assets, is entitled, on account of notes which he has taken up and retained in his possession, on foreclosure of the mortgage, to share with the holder of the rest of the notes in the distribution of the proceeds.

⁷⁷ *Clyde v. Johnson*, 4 N. D. 92, 58 N. W. 512.

⁷⁸ 43 Ohio St. 380, 2 N. E. 434.

McDermott,⁷⁹ say that the assignee for creditors of an insolvent mortgagor of a hotel, who, in furtherance of a scheme for making the hotel furniture, over which no one else had any control, produce a revenue by its use in connection with the real estate, makes payments to be applied upon the mortgage out of the net revenue of the property produced by such scheme, is not entitled to surplus moneys arising from foreclosure of the mortgage, although such payments were not applied thereon, where such amounts were in fact rental of the real estate and not all of the rents which he agreed to pay, since he is under no obligation to see that such rent is applied to reduce the mortgage, and its not being so credited does not affect the sum realized by him as assignee.

§ 845. **Same—Dower interest.**—It is thought that a wife joining with her husband in execution of a mortgage, on sale to satisfy the mortgage, loses her contingent interest in the premises; and an excess in the amount realized is properly applied to the husband's debts.⁸⁰

§ 846. **Same—Grantee or assignee.**—The supreme court of New York, in the case of *Blass v. Terry*,⁸¹ say that the grantee of an undivided half of land who assumes in her deed payment of the half of a mortgage thereon is entitled to the benefit of half the proceeds of a sale of the property as an entirety under foreclosure, in reduction of her share of the mortgage debt. But the Indiana supreme court have held that an assignee of an equity of redemption in premises on which there is a school-fund mortgage, has no interest in the surplus realized upon a sale of the land, under the Indiana statute,⁸² providing that the surplus shall

⁷⁹ 26 Atl. (N. J. Ch.) 889.

⁸⁰ *Kauffman v. Peacock*, 115 Ill. 212, 3 N. E. 749. The same is said to be true of the surplus in the hands of a trustee vested with the

power to sell. *Kauffman v. Peacock*, 115 Ill. 212, 3 N. E. 749.

⁸¹ 87 Hun (N. Y.) 563. 34 N. Y. Supp. 475.

⁸² Ind Rev. Stat. 1881, § 4394.

be paid to the original mortgagor, "his heirs or assignees," when collected, where he has executed an irrevocable power of attorney, coupled with an interest, empowering the agent to sell his interest in the land, and the agent has sold such interest before the assignee made any attempt to revoke the power of attorney.⁸³

§ 847. Same—Lessees of mortgaged premises.—The supreme court of New York, in the case of *Larkin v. Misland*,⁸⁴ say that lessees whose right of occupation is destroyed by foreclosure have no claim therefor against surplus moneys, except in those cases where the annual value of the leasehold exceeds the rent.⁸⁵

⁸³ *Bell v. Corbin*, 136 Ind. 269, 36 N. E. 23.

⁸⁴ 100 N. Y. 212, 3 N. E. 79.

⁸⁵ In delivering the opinion of the court in this case, Judge Finch says:

"This order should be affirmed, solely for the reason that Agnes Misland did not show the value of her leasehold estate in excess of the rents reserved, or that it had any such value. We may grant that the lease which she produced from Louisa was duly delivered, and that there was possession under it, and, so, that she was entitled to be first paid out of the surplus the value of her leasehold estate, before any part of such surplus should go to the lessor as owner of the equity of redemption. But the difficulty remains that there is no sufficient proof of any such value, and, so, no basis for an award to the lessee.

"The whole subject was fully discussed in *Clarkson v. Skidmore*, 46 N. Y. 301. It was there explained that the value of the lease-

hold estate, the sum lost by its destruction, is what it is worth over and above the rent reserved. If its value does not exceed such rents, no loss results from an abridgement of the term. The occupation lost and the rental saved, balance each other. But if the estate is worth something over and above the rental, that excess is lost by the destruction of the term. In this case no such excess of value was in any manner established. The amount of the rent reserved was not shown. It consisted of a sum equal to the interest on incumbrances, the number and amount of which we do not know, and to the insurance premiums, taxes and water-rents. What this annual rental in money amounted to, and how it compared with the actual value of the leasehold estate, is undisclosed, and so no basis existed for estimating a possible loss resulting from the extinction of the lease and to which Agnes was entitled as compensation out of the

§ 848. Same — Judgment creditors. — The supreme court of Louisiana, in the case of *Denegre v. Mushet*,⁸⁶ hold that the purchaser at a foreclosure sale under a senior mortgage has the right to retain any surplus and pay it over to the subordinate mortgagees upon their presenting themselves; and a judgment creditor has no right upon such surplus entitling him to call other creditors holding special mortgages into court for the purpose of a distribution thereof.⁸⁷ It is said, in the case of the *Central Trust Company v. Cincinnati, Jackson & Mackinaw Railroad Company*,⁸⁸ that judgments which, under a reorganization agreement are to be treated as first mortgage bonds, and taken up by bonds issued by the new company, are equally extinguished with the old bonds, and not entitled to share in distribution of a surplus upon

surplus realized. The only fact shown was that value remained in the fee over and above the incumbrances, as indicated by the result of the foreclosure sale. But the case already cited determines that while the surplus realized may be an element in estimating the value of the leasehold, yet the interest upon such surplus is not that value. It in no respect concludes the lessee, and so should not conclude the lessor. In the absence of proof to the contrary, the rents reserved must be presumed to be the fair annual value of the use of the land, and that the fee is worth more than the incumbrances, as shown by a foreclosure sale, does not rebut or destroy that presumption, for the interest upon the value of the fee is much less likely to measure justly the value of the use than the rental agreed upon by the parties as the fair value of such use."

⁸⁶ 46 La. An. 90, 14 So. 348.

⁸⁷ In this case it was claimed that

the proceedings partook of the nature of a concursus under the Louisiana statute (La. Rev. Stat. § 1942, Code Pr. Art. 126), and resembles a tabulation of distribution to which oppositions have been filed, which are open to every objection of law and fact. *Bank v. Turcaud*, 40 La. An. 149, 3 So. 538, *Succession of Aaron*, 11 La. An. 671; *Succession of Lcrude*, 11 La. An. 386. The court declared that it was "only a conflict of privilege between creditors," the statute contemplates, or which authority is conferred upon courts to classify "according to their rank" in the summary manner pointed out, declaring that the statute does not purport to give the courts jurisdiction to summarily adjudge the validity of debts which are secured by privileges or mortgages, and by that means to displace one and advance the rank of another.

⁸⁸ 58 Fed. 500.

mortgage foreclosure of the property of the old company, where such reorganization agreement contemplates the total extinguishment of the old bonds.

§ 849. Same—Same—Attachment creditors.—Lienors other than the mortgagors are entitled to apply for and share in the surplus. Thus it is held that a valid attachment levied upon the equity of redemption and the entire interest of the debtor in lands described in a prior trust deed or mortgage, before a foreclosure sale thereunder, becomes a lien on any surplus proceeds arising from such sale; and such surplus is subject to be applied, upon execution, to the satisfaction of judgment in favor of the attaching creditor.⁸⁹

§ 850. Same—Subsequent lienors.—The universal rule is that upon the sale of land subject to two mortgages, under the first, the lien of the second is transferred from the land to the surplus of the proceeds after satisfying the first mortgage;⁹⁰ and the mortgagee is entitled to such surplus to

⁸⁹ *Brown v. Campbello*, 100 Cal. 635, 38 Am. St. Rep. 314, 35 Pac. 433.

⁹⁰ *Fagan v. People's Sav. & L. Assoc.* 55 Minn. 437, 57 N. W. 142; *Brown v. Crookston Agricultural Assoc.* 34 Minn. 545, 26 N. W. 907; *Robertson v. Brooks*, 65 Neb. 799, 91 N. W. 709; *Jackson v. Coffman*, 110 Tenn. 271, 75 S. W. 718. See *Patton v. Thomson*, (Cal.) 33 Pac. 97; *Clapp v. Hodley*, 141 Ind. 28, 50 Am. St. Rep. 308, 39 N. E. 504; *Kent v. Mellus*, 69 Mich. 71, 37 N. W. 48; *Hooper v. Castetter*, 45 Neb. 67, 63 N. W. 135; *Quackenbush v. O'Hare*, 61 Hun (N. Y.) 388, 16 N. Y. Supp. 33, 4 N. Y. S. R. 797, aff'd 129 N. Y. 485, 29 N. E. 598, 42 N. Y. S. R. 104; *Stewart v. Grace*, 42 S. C. 500, 20 S. E. 411.

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But in Oklahoma this rule does not hold where the junior mortgagee has not been made a party to the foreclosure. *Horr v. Herington*, 22 Okla. 590, 20 L.R.A. (N. S.) 47, 98 Pac. 443.

Second mortgagee in preference to the mortgagor, is entitled to receive the surplus money arising from foreclosure sale under a prior mortgage. *Brown v. Crookston Agri. Asso.* 34 Minn. 545, 26 N. W. 907.

Bonds issued by a railroad company are not entitled to participate in a surplus arising on foreclosure of one division of the road, as to a deficiency upon the sale of the other division under the mortgage made to secure such bonds, in those cases where the bondholders are stock-

the extent necessary to satisfy his mortgage,⁹¹ although by its terms his debt is not due.⁹² On the same principle the surplus arising from a sale of land under a second mortgage

holders of the old road and have pooled their securities for the purpose of buying the road and reorganizing it, and have agreed among themselves that in exchange for their old securities they will receive securities to be issued by the new company, with the intention that the old bonds should be considered extinguished, since such agreement when consummated operates to extinguish the bonds, not only as between the parties thereto, but as to the old road and its other creditors. *Central Trust Co. v. Cincinnati, J. & M. R. Co.* 58, Fed. 500.

In *California*, under Code of Civil Proceedings, § 957, on a foreclosure sale of lands to a junior mortgagee, a decree of foreclosure in whose favor on his cross-complaint for any excess was reversed because his cross-complaint was not served on his mortgagors, the latter cannot recover from the junior mortgagee the excess of the first proceeds of the sale over the amount of the first mortgage under which the sale was had, where the record does not show that the excess is not held by the sheriff subject to the order of the mortgagors. *Patton v. Thomson*, (Cal.) 33 Pac. 97.

In *Michigan* an assignee of a second mortgage claiming the surplus under a prior mortgage, must show that he purchased in good faith for value the interest claimed by him in the mortgage, without

notice of its invalidity. *Kent v. Mellus*, 69 Mich. 71, 37 N. W. 48.

In *New York* the surplus money arising from the sale of mortgaged premises under foreclosure must be paid to the holder of the legal title to a junior mortgage, although another person is equitably entitled to a transfer thereof. *Quackenbush v. O'Hare*, 61 Hun (N. Y.) 388, 40 N. Y. S. R. 797, 16 N. Y. Supp. 33, aff'd in 129 N. Y. 485, 42 N. Y. S. R. 104, 29 N. E. 958.

The mortgagee of an individual member of a firm is only entitled to the surplus after payment of the partnership debts. *Page v. Thomas*, 43 Ohio St. 38, 54 Am. Rep. 788, 1 N. E. 79.

⁹¹ *Milligan v. Gallen*, 64 Neb. 561, 90 N. W. 541. See *Moss v. Robertson*, 56 Neb. 774, 77 N. W. 403; *State ex rel. Hadley v. Clapp*, 147 Ind. 244, 62 Am. St. Rep. 415, 46 N. E. 533; *Robertson v. Brooks*, 65 Neb. 799, 91 N. W. 709; *Continental Ins. Co. v. Recve*, 134 N. Y. Supp. 78; *Stark v. Love*, 128 Mo. App. 24, 106 S. W. 81; *Vogel v. Nachemson*, 137 App. Div. 200, 121 N. Y. Supp. 927. See also *Elsworth v. Woolsey*, 19 App. Div. 385, 46 N. Y. Supp. 486; *Union Trust Co. v. Electric Park Amusement Co.* 168 Mich. 574, 135 N. W. 115. But see *Rochester Savings Bank v. Whitmore*, 25 App. Div. 491, 49 N. Y. Supp. 862; *Milmo National Bank v. Rich*, 16 Tex. Civ. App. 363, 40 S. W. 1032.

⁹² *Fagan v. People's Sav. & L. Assoc.* 55 Minn. 437, 57 N. W. 142.

must be used for paying junior liens, and not the first mortgage, even though the land is sold for its full value.⁹³

The supreme court of Indiana, in the case of *Clapp v. Hadley*,⁹⁴ hold that a mortgagee in a second mortgage, who holds a certificate of purchase of a foreclosure sale thereunder, at which he bid the full amount of principal, interest and costs, is entitled to a lien for the payment of the debts secured by such mortgage upon the surplus arising from a subsequent sale under the first mortgage, of which he was also the owner, although the decrees under both mortgages were obtained at the same time, and no provision was made in either for the distribution of the surplus moneys. But the supreme court of Nebraska, in the case of *Hooper v. Castetter*,⁹⁵ say the holder of a second mortgage on land becomes the purchaser on the foreclosure of his mortgage, to which action the holder of the first mortgage is not made a party, is not entitled, as against the mortgagor, by taking an assignment of the first mortgage after obtaining his decree, but before the sale, to a decree applying the surplus proceeds of the sale towards the liquidation of the mortgage purchased.

§ 851. Same—Lienors paying money to protect their liens.—It is a well-established principle that where a lien-

See *Windt v. Gilleran*, 135 Cal. 94, 66 Pac. 970.

⁹³ *Stewart v. Groce*, 42 S. C. 500, 20 S. E. 411.

Second mortgagee acts at his peril in paying the surplus to the first mortgagee, under a mortgage containing a power of sale and authorizing the mortgagee to pay over the surplus to the holders of subsequent liens who give express written notice of the liens, and if none is given, to the mortgagors, where he has notice of a third mortgage, although no written notice of the lien is given. *Stew-*

art v. Groce, 42 S. C. 500, 20 S. E. 411.

But the receipt by a third mortgagee, with full knowledge of all the facts, of a part of the surplus moneys arising from a sale by the second mortgagee, and paid over by him to the first mortgagee, releases the second mortgagee from liability for the amount so received, but no more. *Stewart v. Groce*, 42 S. C. 500, 20 S. E. 411.

⁹⁴ 141 Ind. 28, 50 Am. St. Rep. 308, 39 N. E. 504.

⁹⁵ 63 N. W. 135.

holder is compelled to expend money for the purpose of protecting his lien against a paramount claim, he is entitled to be subrogated to the right of the person holding such paramount claim, and where the mortgaged property is sold to satisfy another paramount lien or claim, the lienor thus expending money will have his right to be reimbursed for such necessary expenditure transferred from the property to the surplus, if any, arising from the sale of the premises.⁹⁶

§ 852. Same—Where foreclosure under power.—The rules governing the right to and distribution of the surplus arising on a foreclosure sale under a power contained in a trust deed or mortgage, are the same as upon foreclosure by action.⁹⁷ Consequently, a mortgagee who has sold the mortgaged premises under a power of sale, cannot successfully set up the defense of liability to a second mortgagee, in an action by the mortgagor or his executors for the surplus, unless he has discharged the liability by payment of the money to such mortgagee.⁹⁸ It has been said that in those cases where the undertaking on the mortgagee's part is to account to the mortgagors and their heirs and assigns for surplus money arising from sale under power in the mort-

⁹⁶ Thus, it has been said by the circuit court of the United States for the northern district of Ohio that moneys paid by a reorganization committee of the bondholders and stockholders of a railroad, who purchase the road upon foreclosure sale, for the purpose of clearing off liens upon the railroad prior to their bonds, are not a debt which is entitled to participate in surplus moneys arising from the sale of the property subject to the lien therefor, but the payment thereof is a payment which extinguishes it, and not a purchase leaving the debt alive in the hands of the new com-

pany. *Central Trust Co. v. Cincinnati, J. & M. R. Co.* 58 Fed. 500.

See *Union Trust Co. v. Electric Park Amusement Co.* 168 Mich. 574, 135 N. W. 115. See also *Noeker v. Howry*, 119 Mich. 626, 78 N. W. 669.

⁹⁷ See *Perkins v. Stewart*, 75 Minn. 21, 77 N. W. 434; *Price v. Blankinship*, 144 Mo. 203, 45 S. W. 1123; *Bobbitt v. Blackwell*, 120 N. C. 253, 26 S. E. 817; *Jones v. Shepard*, 145 Mo. App. 470, 122 S. W. 764.

⁹⁸ *Mortgage Co. v. Inzer*, 98 Ala. 608, 13 So. 507.

gage, it is an undertaking to pay mortgagors jointly; and an action to recover the surplus must be joint.⁹⁹ And the mortgagee need not examine the records to see if there are incumbrances subsequent to the mortgage.¹ And where land has been mortgaged by one not holding the title, the beneficiaries may affirm the sale by the mortgagee and recover the proceeds in his hands.²

A sale under a trust deed, to be valid, must be made in strict accordance with the terms of such power.³ Hence, an agreement and assurance made by a trustee in a trust deed, that the surplus may be applied upon debts of the mortgagor, when the trust deed expressly provides that it shall be paid to the mortgagor, is not valid; and such agreement is not ratified by the mortgagor's bringing suit against the purchaser for the surplus.⁴

§ 853. Same—Same—Notice of sale.—On a foreclosure under a power, the notice of sale should accurately state the amount due on the mortgage, and for the payment of which the premises are to be sold. Should the mortgagee, in his notice of sale, claim to be due an amount greater than that allowed by the terms of the mortgage or trust deed, and bid in the mortgage for the amount claimed to be due, he will be liable to the mortgagor or his assignee for the excess for which the premises sold over the amount actually due.⁵ And it is said by the supreme court of Minnesota that, where there is a mistake in the computation of the interest due on a note secured by mortgage, and a larger sum is claimed in the notice of sale than is lawfully due, and the premises

⁹⁹ *Clapp v. Pawtucket Inst. for Sav.* 15 R. I. 489, 2 Am. St. Rep. 915, 8 Atl. 697.

¹ *Norman v. Hallsey*, 132 N. C. 6, 43 S. E. 473.

² The trustee entitled to retain expenses of sale and any payments made for the purpose of the trust.

Re Champion (C. A.) 1 Ch. 101. See *post*, § 983.

³ See *ante* § 318.

⁴ *Gair v. Tuttle*, 49 Fed. 198. See *post*, § 893.

⁵ *Fagan v. People's Sav. & L. Asso.* 55 Minn. 437, 57 N. W. 142. See *post*, § 932.

are bid in by the mortgagee, for the sum so claimed, in good faith, believing himself to be bidding for the sum actually due, and the mortgagor is attempting to recover, by action, as surplus, the excessive interest so computed and included in the bid, and the premises are of less value than the sum actually and legally due, equitable relief may be granted the mortgagee, and a resale ordered.⁶

§ 854. Protecting claims to surplus.—Where surplus moneys from the sale of mortgaged premises are brought into court, they take the place of the land, and creditors having liens upon or interests in the land subsequent to the decree under which the sale is made, have the same claim upon the surplus moneys which they had upon the land previous to the decree.⁷ The rights and equities of junior claimants are before the court, and are as much the object of its care as those of the owner of the mortgage foreclosed, and the surplus moneys cannot be disposed of until such claimants are brought into court.⁸

⁶ *Lane v. Holmes*, 55 Minn. 379, 43 Am. St. Rep. 508, 57 N. W. 132.

Value of the use of the mortgaged premises, upon ordering a resale of premises sold under mortgage foreclosure to the mortgagee for a sum in excess of the amount actually due, under a mistake in the computation of interest by which the bid was so increased, for the time they are occupied after the foreclosure and the expiration of the time for redemption, by the mortgagee in actual possession with the actual or implied assent of the mortgagor, need not be tendered to the latter before such resale, since the mortgagee, being in possession after condition broken, is rightfully there, and the mortgagor could not recover possession without satisfy-

ing the mortgage. *Lane v. Holmes*, 55 Minn. 379, 43 Am. St. Rep. 508, 57 N. W. 132.

⁷ *Matthews v. Duryce*, 45 Barb. (N. Y.) 69, 3 Abb. App. Dec. (N. Y.) 220, 17 Abb. (N. Y.) Pr. 256; *Averill v. Loucks*, 6 Barb. (N. Y.) 470; *Wiggin v. Heywood*, 118 Mass. 514.

The supreme court of Pennsylvania, in the case of *Lynn v. Freemansburg Building & Loan Association*, 117 Pa. St. 1, 2 Am. St. Rep. 639, 11 Atl. 537, 20 W. N. C. 185, say that in *scire facias* on a mortgage to a building association, fines under an invalid by-law must be applied on the amount due.

⁸ *DeForest v. Farley*, 62 N. Y. 628; *Livingston v. Mildrum*, 19 N. Y. 440; *Tator v. Adams*, 20 Hun

In ordering a sale of the mortgaged premises for the satisfaction of the debt, the court should take into consideration all the liens which exist subsequent to that of the mortgage foreclosed; as all such liens are cut off by the foreclosure, they should be protected by the court in the decree of sale; otherwise they will be lost. In such cases the court should not content itself with simply giving such directions in the decree as will certainly produce payment of the plaintiff's lien, without regard to the effect such directions may have upon those liens which are subsequent, but it should make such a decree as will fully protect the rights and preserve the equities of all, at the same time maintaining the priority of the plaintiff's claim.⁹

§ 855. **Adjusting equities.**—A court will adjust the equities between subsequent lienors, whenever they can be established without regard to the manner in which the surplus is brought into court.¹⁰ Thus, where different parcels of mortgaged premises are encumbered by separate judgments or mortgages, the equitable rules regulating the marshaling of assets will control the proceedings to determine their priorities and to distribute the surplus.¹¹

(N. Y.) 131; *Beekman v. Gibbs*, 8 Paige Ch. (N. Y.) 511. See *Union Dime Savings Bank v. Osley*, 4 Hun (N. Y.) 657; *Miller v. Dooley*, 1 Law Bull. 50; *Montague v. Marunda*, 71 Neb. 805, 99 N. W. 653.

⁹ *Livingston v. Mildrum*, 19 N. Y. 440. See *Snyder v. Stafford*, 11 Paige Ch. (N. Y.) 71.

¹⁰ *Oppenheimer v. Walker*, 3 Hun (N. Y.) 30, 5 T. & C. (N. Y.) 325; *Snyder v. Stafford*, 11 Paige Ch. (N. Y.) 71; *James v. Hubbard*, 1 Paige Ch. (N. Y.) 228, 234.

¹¹ *New York Life Ins. & Trust Co. v. Vanderbilt*, 12 Abb. (N. Y.)

Pr. 458; *Savings Bank of Utica v. Wood*, 17 Hun (N. Y.) 133; *Oppenheimer v. Walker*, 3 Hun (N. Y.) 30, 5 T. & C. (N. Y.) 325. See *Patty v. Pease*, 8 Paige Ch. (N. Y.) 277, 35 Am. Dec. 683; *Skeel v. Sparker*, 8 Paige Ch. (N. Y.) 182; *Guion v. Knapp*, 6 Paige Ch. (N. Y.) 35, 29 Am. Dec. 741; *Jenkins v. Freyer*, 4 Paige Ch. (N. Y.) 53; *Iglehart v. Crane*, 42 Ill. 261; *Shepherd v. Adams*, 32 Me. 63; *Holden v. Pike*, 24 Me. 427; *Chase v. Woodbury*, 60 Mass. (6 Cush.) 143; *Allen v. Clark*, 34 Mass. (17 Pick.) 47; *Wikoff v. Davis*, 4 N. J. Eq. (3 H. W. Gr.) 224; *Shannon v. Marselis*.

The general rule is that, in foreclosure proceedings, the amount due on the mortgage, and the rights of the parties, are to be determined as of the date of the judgment or decree,¹² but the proceeds must be applied to the payment of mortgage claims according to their respective ranks, to be ascertained by the dates of registry.¹³ But where a note has been transferred, together with a mortgage given to secure it and other notes, the transferee is entitled to priority in the distribution of the proceeds of a sale under the mortgage.¹⁴ And it is thought that the assignment to different persons of two promissory notes coming due at different times, secured by a mortgage, entitles each of the assignees to a *pro rata* application of the proceeds of the mortgaged premises, where the sum realized from their sale is insufficient to pay the notes in full.¹⁵

But in those cases where a mortgage is given to secure several notes maturing at different times, some of which are otherwise secured, the proceeds arising from a sale of the mortgaged premises will be first applied in payment of notes which are not otherwise secured, although such notes are not the first to mature, where the payee and mortgagee indorsed the two notes first maturing as an additional security in order to induce the assignee to purchase them.¹⁶ And one who transfers a note secured by mortgage, under an agreement to pay the transferrer interest due at the time of transfer,

1 N. J. Eq. (1 Saxt.) 413; *Brown v. Simmons*, 44 Vt. 475; *Lyman v. Lyman*, 32 Vt. 79, 76 Am. Dec. 151; *Jones v. Myrick*, 8 Gratt. (Va.) 179; *Henkle v. Allstadt*, 4 Gratt. (Va.) 284; *Herbert's Case*, 3 Coke, 11b. Compare *Parkman v. Welch*, 36 Mass. (19 Pick.) 231.

¹² *Clark v. Clark*, 62 N. H. 267.

¹³ *Reusch v. Keenan*, 42 La. An. 14, 7 So. 589. See *post*, § 856.

¹⁴ *Miller v. Washington Sav. Bank*, 5 Wash. 200, 31 Pac. 712.

¹⁵ *Aberdeen First Nat. Bank v. Andrews*, 7 Wash. 261, 38 Am. St. Rep. 885, 34 Pac. 913; *Lovell v. Craig*, 136 U. S. 130, 34 L. ed. 372, 10 Sup. Ct. Rep. 1024.

An hypothecary action lies in Louisiana to enforce such claim. *Lovell v. Cragin*, 136 U. S. 130, 34 L. ed. 372, 10 Sup. Ct. Rep. 1024.

¹⁶ *Robinson v. Waddell*, 53 Kan. 402, 36 Pac. 730.

“when the same should be collected on said note and mortgage,” without any other qualification, is entitled to receive the interest out of the first moneys, realized from foreclosure sale, after the payment of the costs and expenses thereof.¹⁷

It has been said by the supreme court of Michigan, in the case of *High v. American Wheel Company*,¹⁸ that one of several persons whose claims for both existing indebtedness and liability as indorser are secured by a trust mortgage, but who has received a part of the amount due on one claim from other sources, is not obliged to deduct the amount so received from the amount originally secured in order to obtain the amount on which he is entitled to a dividend on each claim, where the property is insufficient to pay all the claims in full, but he is entitled to a dividend on each claim for its total amount as secured by the mortgage, subject to the proviso that this should not exceed the amount actually remaining due on such claims.

The supreme court of Virginia, in the case of *Mosley v. Johnson*,¹⁹ say that where the trustees under a trust deed, sell without authority some of the trust property, they may be compelled to pay into court the value of the property sold, out of which the creditors must first be paid; and the surplus, if any, will be returned to the debtor or to his representatives.

The supreme court of New York, in the case of *Shaw v. Saranac Horse Shoe Nail Company*,²⁰ say that the purchasers at their par value of the bonds of a corporation issued for the purpose of raising money to pay its floating debts, and which are authorized to be sold at a price not less than par, have an equity in the proceeds realized from the foreclosure of the mortgage given to secure the bonds, superior to that of a stockholder who has agreed to pay the debts of the cor-

¹⁷ *Haber v. Brown*, 101 Cal. 445, 35 Pac. 1035.

¹⁹ 37 Mich. 502, 56 N. W. 927, 21 L.R.A. 822.

¹⁸ 86 Va. 429, 10 S. E. 425, 13 Va. L. J. 872.

²⁰ 78 Hun (N. Y.) 7, 29 N. Y. Supp. 254, 60 N. Y. S. R. 804.

poration after its insolvency has been recognized, and has taken assignments of bonds that had been given as security for past-due notes, instead of being sold for their par value as provided for, for the purpose of contribution from the other stockholders.

The chancery court of New Jersey, in the case of *Point Breeze Ferry and Improvement Company v. Bragaw*,²¹ say that on the foreclosure of a mortgage given by a riparian owner, covering the shore and including the land lying under water in front of the upland, which was afterwards leased from the state and improved by filling below high-water mark, the lessee has a higher title and superior right to be first paid the price of the lease and the value of the improvements.²²

§ 856. Liens to be paid in order of priority in time.—

All incumbrances on mortgaged premises inferior to the mortgage on which the sale is based, must be paid in the order of time in which they respectively became liens.²³

A mortgage will be preferred to a judgment lien in the distribution of the surplus, where, under a contract of sale, the deed was left in escrow until a certain amount should be paid, and a mortgage given to secure the remaining indebtedness, and the judgment was recovered against the purchaser prior to the delivery of the deed and the execution of the mortgage, because the equitable lien which the mortgage secured was

²¹ 47 N. J. Eq. (2 Dick.) 298, 20 Atl. 967.

²² As to rights of riparian mortgage in strip of land under water reclaimed after execution of mortgage. See *ante*, § 291.

²³ *McKinstry v. Mervin*, cited in 3 Johns. Ch. (N. Y.) 466; *Haines v. Beach*, 3 Johns. Ch. (N. Y.) 459. *Re Ferguson's Estate* (Mo.) 27 S. W. 513; *Reusch v. Keenan*, 42 La. An. 419, 7 So. 589; *Clark v. Clark*,

62 N. H. 267. See *People v. Bergen*, 53 N. Y. 404; *Peabody v. Roberts*, 47 Barb. (N. Y.) 91; *Freeman v. Schroeder*, 43 Barb. (N. Y.) 618; *Averill v. Loucks*, 6 Barb. (N. Y.) 470; *Durling v. Stillwell*, 74 N. J. Eq. 697, 69 Atl. 978. As to priority of the liens on surplus moneys on foreclosure, see *Savings Bank of Utica v. Wood*, 17 Hun (N. Y.) 133.

prior in fact to the judgment.²⁴ A judgment will not be preferred to a prior unrecorded mortgage given to secure future advances or liabilities, unless there has been a fraudulent intention on the part of the mortgagee in withholding his mortgage from record.²⁵

But the supreme court of Florida, in *Edwards v. Thom*,²⁶ say that a *bona fide* mortgagee who has been made a party defendant with the mortgagor to a bill filed to foreclose a duly recorded prior mortgage, and has become the purchaser at the sale made under a decree in such a suit, is entitled to priority of payment out of the excess of the proceeds of sale, as against a mortgage executed before his, but not legally recorded, and of which he had no notice when he took his own mortgage.

And it has been said that where land held by a purchaser in a foreclosure of a junior mortgage was foreclosed under one of two senior mortgages of equal priority, the application of the balance of the proceeds, after satisfaction of the mortgage foreclosed, to the other mortgage, on special execution, was an irregularity of which the purchaser under the junior mortgage did not complain.²⁷

In those cases where a mortgage is given to secure several notes, but contains no stipulation as to the order in which the notes should be paid, and there is no agreement as to such order, there can be no priority of rights in favor of different assignees of such notes, but they are entitled to participate ratably in the fund derived from the security.²⁸ And one who has advanced money to redeem property from an execution and a decree foreclosing a mortgage which has become absolute, and conveyed the title obtained to the mort-

²⁴ *Cook v. Kraft*, 3 Lans. (N. Y.) 512, 41 How. (N. Y.) Pr. 279, 60 Barb. (N. Y.) 410.

²⁵ *Thomas v. Kelsey*, 30 Barb. (N. Y.) 268.

²⁶ 25 Fla. 222, 5 So. 707.

²⁷ *Stanbrough v. Daniels*, 77 Iowa, 561, 42 N. W. 443.

²⁸ *Penzel v. Brookmire*, 51 Ark. 105, 14 Am. St. Rep. 23, 10 S. W. 15.

gagor under an agreement that the property shall remain as security for the whole sum advanced, is entitled to be repaid in excess of moneys advanced over the amount of the two liens as against the mortgagees whose rights are inferior thereto, since they would have been entirely cut off and must rely on the conveyance to the mortgagor, and in relying thereon must take it subject to the agreement upon which it was made.²⁹

In Louisiana it is held that in executory process to enforce a special mortgage, a plaintiff holding a legal mortgage upon half of the property covered by the special mortgage cannot require the proceeds to be distributed so as also to satisfy the general or legal mortgage.³⁰

In Pennsylvania it is held that under the statute ³¹ the lien given a widow upon lands assigned to one of the heirs in partition of her husband's estate, extends only so far as to secure the sum accrued to her, and does not affect the life estate to which she was previously entitled; and arrearages remaining unpaid at her death can be paid only out of the surplus resulting from the sale of the land upon a foreclosure of a mortgage given by such heir to secure her life estate and the interest of the other heirs after her death, and not from the proceeds payable to such heirs.³²

§ 857. Questions of priority—How determined.—In New York, where a surplus arises upon the foreclosure of a first mortgage in a county court, the claims of junior mortgagees and judgment creditors must be litigated before a referee appointed in the foreclosure by the same court; an action for that purpose cannot be maintained in the supreme court.³³ Where there is a surplus arising from the sale of

²⁹ *Johnson v. Valido Marble Co.* 64 Vt. 337, 25 Atl. 441.

³⁰ *Dodds v. Lanoux*, 45 La. An 287, 12 So. 345.

³¹ Pa. Act, March 29, 1832, 41.

³² *Hagenman v. Esterly*, (Pa. C.

P.) 1 Pa. Dist. Rep. 704, 11 Pa. Co. Ct. Rep. 609.

³³ *Fliess v. Buckley*, 90 N. Y. 286, affirming 24 Hun (N. Y.) 514, 22 Hun (N. Y.) 551.

mortgaged premises, such surplus may, in the absence of contesting creditors, be applied directly to the payment of another debt owing by the mortgagor to the assignee of the mortgage and secured upon said premises.³⁴ And where there are other claimants, the plaintiff will have the same right to present and establish a claim to the surplus as a defendant to the foreclosure or any other person.³⁵

Where the demands of the plaintiff, in addition to the claim on his mortgage, are junior to such mortgage, they should be set out in the complaint, so that they may be litigated and disposed of by the decree of foreclosure.³⁶ The sale of the property cannot be made subject to subsequent liens which the plaintiff may have against it.³⁷

It has been said that an insolvent indorser of promissory notes secured by a mortgage which is insufficient to pay them in full, is not entitled to share in the distribution of the proceeds of the mortgage on account of a portion of such notes, which it had transferred as collateral security, and had again become entitled to receive because of the repayment of the debt secured.³⁸ And the debts of a corporation for the salaries of its officers, are not entitled to priority of payment out of

³⁴ *Bcekman's Fire Ins. Co. v. First M. E. Church of New York*, 29 Barb. (N. Y.) 658, 18 How. (N. Y.) Pr. 431.

³⁵ *Field v. Hawxhurst*, 9 How. (N. Y.) Pr. 75; *Mutual Ins. Co. v. Truchtnicht*, 3 Abb. (N. Y.) N. C. 135. Thus, where a mortgagee sold under the statute and had a surplus in his hands, and the mortgagor's grantee sued for it, it was held that the fact that the former had a judgment lien upon the land equal to the surplus, was a sufficient defense. *Eddy v. Smith*, 13 Wend. (N. Y.) 488.

³⁶ *Tower v. White*, 10 Paige Ch. (N. Y.) 395. See *Wheeler v. Van Kuren*, 1 Barb. Ch. (N. Y.) 490 *The Homeopathic Mutual Life Ins. Co. v. Sixbury*, 17 Hun (N. Y.) 424.

³⁷ *Roosevelt v. Elithorp*, 10 Paige Ch. (N. Y.) 415; *The Homeopathic Mutual Life Ins. Co. v. Sixbury*, 17 Hun (N. Y.) 424.

³⁸ *New York Fourth Nat. Bank's Appeal*, 123 Pa. St. 473, 10 Am. St. Rep. 538, 16 Atl. 779, 46 Phila. Leg. Int. 220, 19 Pitts. L. J. N. S. 295, 23 W. N. C. 55, 17 Wash. L. Rep. 392.

the proceeds of the mortgaged property of the corporation over the liens of the mortgagees.³⁹

§ 858. Claims must be liens on mortgaged premises.—To enable a creditor to enforce his claim to the surplus moneys he must establish a lien on the mortgaged premises. The surplus moneys arising from a sale on foreclosure take the place of the land for the purpose of distribution among the persons having claims thereto.⁴⁰ A simple contract creditor cannot claim any portion of the fund; ⁴¹ claims, however just, which have not been perfected into liens, under which the property could be sold on execution, cannot be taken into account by the referee.⁴² The general legal liens of the judgment creditors of a mortgagor, however, cannot, in equity, prevail against prior equitable claims upon the mortgaged premises.⁴³

The inchoate rights of mechanics and material-men, under the statute giving them a lien, seem to be claims of such a nature, however, that, although not established by judgment, they are entitled to be considered by the referee on an application for the surplus, and to share in the distribution thereof.⁴⁴

³⁹ *Stafford v. Blum*, 7 Tex. Civ. App. 283, 27 S. W. 12.

⁴⁰ *Clarkson v. Skidmore*, 46 N. Y. 297; *Livingston v. Mildrum*, 19 N. Y. 440; *Matthews v. Duryee*, 45 Barb. (N. Y.) 69, aff'd 4 Keyes (N. Y.) 525; *Averill v. Loucks*, 6 Barb. (N. Y.) 471; *Blydenburgh v. Northrop*, 13 How. (N. Y.) Pr. 289; *Fliess v. Buckley*, 22 Hun (N. Y.) 551, affirmed 90 N. Y. 286; *Elmendorf v. Lockwood*, 4 Lans. (N. Y.) 396; *Snyder v. Stafford*, 11 Paige Ch. (N. Y.) 71.

⁴¹ *Delafeld v. White*, 19 Abb. (N. Y.) N. C. 104. See *People ex rel. Short v. Bacon*, 99 N. Y. 275; *Dun-*

ning v. Ocean Nat. Bank, 61 N. Y. 497, 19 Am. Rep. 293.

⁴² *Husted v. Dakin*, 17 Abb. (N. Y.) Pr. 137; *King v. West*, 10 How. (N. Y.) Pr. 333. See *Mutual Life Ins. Co. v. Bowen*, 47 Barb. (N. Y.) 618.

⁴³ *Sweet v. Jacobs*, 6 Paige Ch. (N. Y.) 355, 31 Am. Dec. 252; *Arnold v. Patrick*, 6 Paige Ch. N. Y.) 310; *White v. Carpenter*, 2 Paige Ch. (N. Y.) 217; *In re Howe*, 1 Paige Ch. (N. Y.) 125, 19 Am. Dec. 395.

⁴⁴ *Livingston v. Mildrum*, 19 N. Y. 440. See *post*, § 886.

§ 859. Equitable distribution—Claims liens on two funds.—In the distribution of surplus moneys arising on the sale of mortgaged premises, a prior general lien thereon will be preferred to a subsequent specific lien, especially if the holder of the former has no other fund to resort to and the owner of the specific lien has. This rule is based upon the well settled principle of equity that where one creditor has a lien upon two funds, and another creditor has a lien upon only one of those funds, the latter has a right to require the former to exhaust his remedies against the fund on which he alone has a lien before resorting to the other fund.⁴⁵

§ 860. Distribution of surplus — Mortgagor deceased.—Where, after the death of a mortgagor, an action is brought to foreclose a mortgage which accrued during his life-time, and letters testamentary or of administration were issued upon his estate by a surrogate within four years prior to the sale, the New York Code of Civil Procedure⁴⁶ requires that the surplus moneys arising from such sale shall be paid into the surrogate's court from which the letters were issued.⁴⁷

Where, after the death of a mortgagor, an action is commenced to foreclose a mortgage on his real estate, in which a sale is had in accordance with a decree of the court, the surplus arising on the sale may be distributed by and under the direction of the court rendering such decree;⁴⁸ such surplus should be distributed ratably among all the general and judgment creditors of the deceased owner, after notice to them and

⁴⁵ *Mechanics' Bank v. Edwards*, 1 Barb. (N. Y.) 271, 2 Barb. (N. Y.) 545, 6 N. Y. Leg. Obs. 159.

⁴⁶ N. Y. Code Civ. Proc. §§ 2798, 2799.

⁴⁷ As to the right to have the surplus paid into the surrogate's court, see *White v. Poillon*, 25 Hun (N. Y.) 69; and as to the applicability

of this section of the Code to sales where the foreclosure is conducted by an action, see *Loucks v. Van-Allen*, 11 Abb. (N. Y.) Pr. N. S. 427; *German Savings Bank v. Sharer*, 25 Hun (N. Y.) 409.

⁴⁸ *German Savings Bank v. Sharer*, 25 Hun (N. Y.) 409.

after an opportunity has been given them to be heard.⁴⁹ But where a general creditor, who had no notice of the proceedings for the distribution of such surplus, until after the order of the court confirming the report of the referee as to the distribution of the moneys was granted, applies to be made a party to the proceedings and for an opportunity to be heard, his application will be granted.⁵⁰

Where a mortgage is foreclosed after the death of the mortgagor or owner of the equity of redemption, the surplus money passes to his heirs or devisees, and cannot be collected by his executor or administrator, although the mortgage may contain an agreement to pay any surplus arising on such sale to the mortgagor, his executors or administrators.⁵¹ In such a case creditors must be paid before legatees,⁵² because debts are in the nature of charges upon the realty, and it is only the residue left after paying such debts that can be divided among the heirs or devisees.⁵³

Specific devisees of the land are entitled to the surplus moneys arising therefrom, according to their respective liens under the will, subject, however, to the assertion of other legal claims which were liens upon the land before its sale, or which have equitably become prior liens upon the fund arising therefrom since that time.⁵⁴

§ 861. Interest of life-tenant in surplus.—Upon a distribution in the surrogate's court of the surplus moneys arising from a sale of mortgaged premises on foreclosure, under

⁴⁹ *Loucks v. VanAllen*, 11 Abb. (N. Y.) Pr. N. S. 427; *German Sav. Bank v. Sharer*, 25 Hun (N. Y.) 409; *White v. Poillon*, 25 Hun (N. Y.) 69.

⁵⁰ *German Sav. Bank v. Sharer*, 25 Hun (N. Y.) 409.

⁵¹ See *Dunning v. Ocean Nat. Bank*, 61 N. Y. 497, 19 Am. Rep. 293, aff'g 6 Lans. (N. Y.) 296. See *ante*, § 839 note 4.

⁵² *Clark's Case*, 15 Abb. (N. Y.) Pr. 227.

⁵³ *German Sav. Bank v. Sharer*, 25 Hun (N. Y.) 409. See N. Y. Code Civ. Proc. § 2750.

⁵⁴ *Delafield v. White*, 19 Abb. (N. Y.) N. C. 104. See *People ex rel. Short v. Bacon*, 99 N. Y. 275; *Fliess v. Buckley*, 90 N. Y. 286; *Dunning v. Ocean Nat. Bank*, 61 N. Y. 497, 19 Am. Rep. 293.

the provisions of the Code,⁵⁵ where there is a life estate in the land sold, the fund must be invested under the direction of the court and the income thereof paid to the beneficiary until the determination of such life estate; the surrogate cannot order the payment of a gross sum in lieu thereof.⁵⁶

But in the Matter of Zahrt,⁵⁷ it was said that where land, in which a widow, by the terms of her deceased husband's will, has a life estate, is sold upon foreclosure, leaving a surplus, it rests in the sound discretion of the court whether or not she shall receive a gross sum for the value of such estate, to be estimated by the rules of practice established by the supreme court.⁵⁸

§ 862. Rights of prior incumbrancers not parties.—A prior claimant, whatever his lien may be, is not entitled to participate in the distribution of the surplus, unless he was a party to the foreclosure,⁵⁹ for where he was not made a party, his lien will not be affected, nor the land discharged of his incumbrance, nor the lien transferred to the surplus moneys.⁶⁰ Hence, where a prior incumbrancer is not made a party and his lien is not affected by the foreclosure, he will have no claim to the surplus, unless he releases to the purchaser all future claims upon the equity of redemption.⁶¹ It is said that this rule is not technical, but is founded on the equitable

⁵⁵ N. Y. Code Civ. Proc. § 2799.

⁵⁶ See *Zahrt's Estate*, 11 Abb. (N. Y.) N. C. 225, citing *Arrowsmith v. Arrowsmith*, 8 Hun (N. Y.) 606; *In re Igglesden*, 3 Redf. (N. Y.) 375, 378. See *Lewis v. Smith*, 9 N. Y. 502, 61 Am. Dec. 706.

⁵⁷ 94 N. Y. 605.

⁵⁸ N. Y. Supreme Court Rule 70.

⁵⁹ *Root v. Wheeler*, 12 Abb. (N. Y.) Pr. 294; *Mutual Life Ins. Co. of N. Y. v. Truchtnicht*, 3 Abb. (N. Y.) N. C. 135; *Winslow v. McCall*, Mortg. Vol. II.—78.

32 Barb. (N. Y.) 241. See *Koch v. Purcell*, 45 N. Y. Supr. Ct. (13 J. & S.) 162.

⁶⁰ *Mutual Life Ins. Co. of N. Y. v. Truchtnicht*, 3 Abb. (N. Y.) N. C. 135; *Winslow v. McCall*, 32 Barb. (N. Y.) 247; *Waller v. Harris*, 7 Paige Ch. (N. Y.) 167, aff'd 20 Wend. (N. Y.) 555, 32 Am. Dec. 590.

⁶¹ *Emigrant Industrial Savings Bank v. Goldman*, 75 N. Y. 127; *Bache v. Doscher*, 67 N. Y. 429;

principle that such a party cannot have a lien on both the land and the surplus.⁶²

A senior mortgage duly recorded being notice to a purchaser at a sale on a foreclosure of a junior mortgage, unless he is misled by the conduct of the mortgagee or his agent, which induces him to conclude that the property is sold free from the prior lien, he will take the property subject to such prior mortgage. If at the time of the sale such mortgage has been foreclosed, the mortgagee may place his execution in the hands of the officers making the sale, and cause the title to be sold unincumbered, and claim the proceedings arising therefrom, according to the date of his lien.⁶³

§ 863. **Liens attaching pendente lite.**—It is said in *Koch v. Purcell*,⁶⁴ that one who takes a mortgage after a *lis pendens* has been filed, will have a right to be heard on the reference for the distribution of the surplus, although he was not made a party to the foreclosure. And it has been held that the surplus remaining after the payment of the mortgage debt, may, on application, be paid to an incumbrancer not a party to the suit, if it appears that he is, in equity, entitled to receive it.⁶⁵

Incumbrancers, and persons acquiring other interests in the mortgaged premises *pendente lite*, need not be made parties to the foreclosure, because their interests in the subject matter of the suit will be bound and concluded by the decree.⁶⁶ If the liens of such persons are not presented and shown to exist, the surplus may be distributed without notice to them; where their liens are presented in proper form, they will be

Root v. Wheeler, 12 Abb. (N. Y.) Pr. 294; *Winslow v. McCall*, 32 Barb. (N. Y.) 241.

⁶² *Mutual Life Ins. Co. of N. Y. v. Truchtnicht*, 3 Abb. (N. Y.) N. C. 135.

⁶³ *Roberts v. Hinson*, 77 Ga. 589, 2 S. E. 752.

⁶⁴ 45 N. Y. Supr. Ct. (13 J. & S.) 162.

⁶⁵ *Ellis v. Southwell*, 29 Ill. 549.

⁶⁶ *Cook v. Mancius*, 5 Johns. Ch. (N. Y.) 89; *Darling v. Osborne*, 51 Vt. 158. See *Harrington v. Slade*, 22 Barb. (N. Y.) 161; *People's Bank v. Hamilton Manuf. Co.* 10

entitled to notice of the proceedings to distribute the surplus, and their rights will be protected by the court.⁶⁷

§ 864..Equitable priorities between subsequent mortgagees.—Where there are several liens upon the mortgaged premises, the surplus money is to be applied to their discharge in the order of their priority,⁶⁸ and, presumptively, the mortgage first recorded is the prior lien.⁶⁹ This presumption, however, may be overcome by proof that the mortgage first recorded, by verbal agreement between the mortgagor and the mortgagee, is not to become operative until the whole consideration is paid.⁷⁰

An agreement between a mortgagee and a mortgagor that the mortgage shall be second in time to another mortgage on the same premises will, if such agreement is made prior to the delivery of the mortgage, be binding upon the parties as well as upon an assignee of the mortgage,⁷¹ because, as between

Paige Ch. (N. Y.) 481; *Sedgwick v. Cleveland*, 7 Paige Ch. (N. Y.) 287.

⁶⁷ *Cook v. Mancius*, 5 Johns. Ch. (N. Y.) 89. See N. Y. Supreme Court Rule 64.

⁶⁸ *Averill v. Loucks*, 6 Barb. (N. Y.) 470. See *ante*, §§ 856, 857.

⁶⁹ *Freeman v. Schroeder*, 43 Barb. (N. Y.) 618, 29 How. (N. Y.) Pr. 263.

⁷⁰ Where a plaintiff on Dec. 4, 1846, executed two mortgages at the same time on the same piece of property, for the purchase money, one to secure \$221.56, payable in nine equal annual installments, and the other \$86.23, payable in three equal annual installments, the first installment to become due Dec. 4, 1856, it was agreed that the mort-

gage securing the \$221.56 should be the first lien on the premises. This mortgage was subsequently assigned by the mortgagee to the defendant, and was foreclosed under the statute. Upon the sale of the premises on Jan. 5, 1850, they were struck off to M. for \$431.50, a sum larger than the amount due upon the mortgage, together with the costs of foreclosure. The court held that the defendant was entitled to have the mortgage for \$86.23 first satisfied out of the surplus moneys, and that the plaintiff was entitled only to the balance remaining after paying that mortgage, with interest. *Barber v. Cary*, 11 Barb. (N. Y.) 549.

⁷¹ *Freeman v. Schroeder*, 43 Barb. (N. Y.) 618, 29 How. (N. Y.) Pr. 263.

the holders of different mortgages, an assignee occupies no better position than did his assignor.⁷²

Thus, in a case where a mortgage was assigned, but the assignment was not recorded, and subsequently a satisfaction price was executed by the original mortgagee, which was duly recorded, and a second mortgage was executed upon the same premises, it was held that the recording act protected the second mortgagee and that he had a prior lien upon the surplus.⁷³

The supreme court of the United States, in the case of the Farmers' Loan and Trust Company v. Newman⁷⁴, say that where the receiver of a railroad company agreed to pay a lien on the part of the railroad out of the money realized from such part upon foreclosure sale, and the lienor surrendered his lien, and the receiver bid in the property on such sale as an entirety, the right of the lienor to be paid out of the aggregate proceeds of the sale is not defeated by the fact that the mortgage bondholders made payment in mortgage bonds, as allowed by the decree of sale and if the lien is not discharged in money the property will again be sold as an entirety, or so much thereof as is necessary to raise the amount of the lien.

§ 865. Burden of proof in showing priorities.—To overcome the presumption as to priority, the burden of proof is upon the holder of the subsequent claim to show his prior right by positive evidence.⁷⁵ If the mortgage first recorded is shown not to have been a valid lien for its amount at the time a subsequent mortgage was given, by reason of the consideration not having been fully paid, and there was a verbal

⁷² *Yerger v. Barz*, 56 Iowa, 77.

⁷³ *Bacon v. VanSchoonhoven*, 19 Hun (N. Y.) 158.

⁷⁴ 127 U. S. 649, 32 L. ed. 303, 8 Sup. Ct. Rep. 1364.

⁷⁵ *People, etc. v. Bergen*, 15 Abb.

(N. Y.) Pr. N. S. 97, 53 N. Y. 404; *Peabody v. Roberts*, 47 Barb. (N. Y.) 91; *Frceman v. Schroeder*, 43 Barb. (N. Y.) 618, 29 How. (N. Y.) Pr. 263

agreement between the mortgagor and the mortgagee that it should not become operative until the whole consideration was paid, the presumption of priority will be destroyed.⁷⁶ And where a mortgage is recorded with notice to the mortgagee of the existence of a prior unrecorded mortgage, such notice will destroy the priority of the lien of the mortgage last executed.⁷⁷

§ 866. Rights of equal mortgagees — Senior mortgagees.—Where the liens are equal in rank they will be protected by the court, and the power of the court to protect such equality will not be impaired by an error into which the referee may have fallen in conducting the sale.⁷⁸

⁷⁶ *Freeman v. Schroeder*, 43 Barb. (N. Y.) 618, 29 How. (N. Y.) Pr. 263.

⁷⁷ *Haywood v. Shaw*, 16 How. (N. Y.) Pr. 119.

⁷⁸ *Eleventh Ward Savings Bank v. Hay*, 55 How. (N. Y.) Pr. 444. In this case three actions were commenced to foreclose separate mortgages of equal date, lien, time of record, and amount of purchase money upon the same parcel of land, the three mortgages having been originally made to secure a separate amount to each of the several grantors of the premises. The actions were numbered 1, 2 and 3; three separate judgments were entered, all of which were dated Nov. 20, and were filed on Nov. 22. The referee appointed by said judgments to sell the mortgaged premises, offered them for sale under the judgment in action No. 1, and the premises were sold for \$34,500. Afterwards the same premises were offered for sale under judgment No. 2, and were struck off to the same purchaser for \$250, and im-

mediately thereafter the same premises were offered by the referee for sale under the third judgment, and were struck off to the same purchaser for \$250. On the petition of one of the sureties for the payment of said mortgage debt, asking that an order be made in said actions directing the referee to apply the amount of the proceeds of the sales under said judgments equally to each, the court held: (1) that no one of the mortgages had any priority over the others and that the referee should not be permitted to give precedence to one of the judgments simply because he found it marked No. 1; that the court itself had no power to give that judgment or that mortgage priority; (2) that it is the duty of the court to protect the equality of liens where it exists, and that, in performing that duty, it will look behind the proceedings of the referee to the transaction out of which the liens arose; (3) that, as the three mortgages were equal liens, equity required that the money received at the sale

A senior mortgagee, or one who has acquired his prior rights by subrogation, can claim no right to the surplus moneys realized on the foreclosure of a junior mortgage;⁷⁹ because his lien is not disturbed thereby and his remedy is to foreclose his senior mortgage.⁸⁰ And where one purchases at a judicial sale "subject to all incumbrances," he is not entitled to have the surplus moneys applied to the payment of a prior recorded mortgage, the existence of which was unknown to all the parties because of an error in indexing it.⁸¹

§ 867. Several mortgages security for same debt.—

In a case where the plaintiff, who owned two mortgages against the same defendant upon two distinct parcels of land,

should be divided among them equally.

⁷⁹ See *Brown v. Crookston Agricultural Assoc.* 34 Minn. 545. See *Ward v. McNaughton*, 43 Cal. 159; *Soles v. Sheppard*, 99 Ill. 616. In a recent case it appeared that M. and C. each owned a one-half interest in a piece of real estate on which D., as a special guardian, held a mortgage executed by M. At the request of both M. and C., and upon their promise to give him a second mortgage upon the same property, which would amply secure his claims, without an order of the court, D. released his mortgage so that they could raise money on a first mortgage. This mortgage was given to plaintiff's testator to secure \$1,500, C. signing as surety for M. thereon; before another mortgage was given to D., M. executed a mortgage upon his undivided share to C. to secure her against loss on the mortgage given to plaintiff's testator. The mortgage subsequently given to D. was

not executed by C. In proceedings to obtain the surplus arising on the foreclosure of the mortgage given to plaintiff's testator, the court held that as between D's and C's mortgages, the former was the prior lien and entitled to have the surplus applied thereon. *Plumb v. Thompson*, 15 N. Y. Wk. Dig. 310.

In *Savings Bank of Utica v. Wood*, 17 Hun (N. Y.) 133, it appeared that a mortgage was made for the benefit of a brother on two tracts of land, one owned by himself and his sisters as tenants in common, the other owned by himself individually; a judgment was afterwards obtained against him, and subsequently the sisters mortgaged their interest. It was held by the court, that upon the foreclosure of the first mortgage, the mortgage executed by the sisters was entitled to priority over the judgment in the surplus moneys.

⁸⁰ *Firestone v. State*, 100 Ind. 226.

⁸¹ *Buttrick v. Tibbitts*, 10 Abb. (N. Y.) N. C. 41.

brought actions to foreclose both mortgages, and on the sale of one of the parcels there was a surplus, and of the other a deficiency, the court held that the surplus of the one could not be applied to supply the deficiency of the other.⁸²

And it has been held that a junior mortgage, taken as collateral security for another obligation, does not entitle the mortgagee to receive his debt out of the surplus arising from the foreclosure of a mortgage prior to his collateral mortgage until he has exhausted his principal security.⁸³ It was held in *Cox v. Wheeler*,⁸⁴ however, that where a mortgagee, whose mortgage was payable in installments, sold the premises for the payment of one installment subject to the future installments, he was entitled to the surplus moneys arising from the foreclosure beyond the installment which was due and the costs of the sale.

§ 868. Priority of unrecorded mortgage over subsequent judgment.—In order that mortgages may stand in the relation of being prior and subsequent to one another, they must cover the same land.⁸⁵ It has been held that an unrecorded mortgage to secure future advances is entitled to priority over a subsequently docketed judgment,⁸⁶ unless there has been a fraudulent intention on the part of the mortgagee in withholding his mortgage from record.⁸⁷

⁸² *Bridgen v. Carhartt*, Hopk. Ch. (N. Y.) 234. See *Fliess v. Buckley*, 24 Hun (N. Y.) 514.

⁸³ *Soule v. Ludlow*, 3 Hun (N. Y.) 503, 6 T. & C. (N. Y.) 24. See *post*, § 875.

⁸⁴ 7 Paige Ch. (N. Y.) 248.

⁸⁵ *Westervelt v. Voorhis*, 42 N. J. Eq. (15 Stew.) 179.

⁸⁶ *Thomas v. Kelsey*, 30 Barb. (N. Y.) 268. See *Savings Bank of Utica v. Wood*, 17 Hun (N. Y.) 133; *Wheeler v. Kirtland*, 24 N. J. Eq. (9 C. E. Gr.) 552.

⁸⁷ In the case of the *Central*

Trust Co. v. Sloan, 65 Iowa, 655, the Central Iowa Railway Co. took the title to its property under a decree and order of the circuit court of the United States, which bound it to pay defendant's claim. Afterwards, but before the defendant had put his claim into judgment against the railway company, it mortgaged its property to the plaintiff's trust company. It was held that the trust company knew, or was bound to know, that the title of the railway company was based on the decree and order, and

A mortgage to secure future indorsements, if recorded, will have priority over subsequent judgments against the mortgagor, as well for indorsements made after the judgments as before.⁸⁸ And where a mortgage is given on property, while a judgment against the mortgagor is marked "secured on appeal," on which it would otherwise be a lien, and such judgment is thereafter restored as a lien, the mortgage will be entitled, as against such judgment, to priority of payment out of the surplus moneys arising on the foreclosure of a prior mortgage.⁸⁹

§ 869. Second mortgage and junior judgments.—Where mortgaged premises are sold under a prior judgment and the surplus arising from such sale is brought into court, it will belong to the second mortgagee, and subsequent mortgagees of the land will be preferred to judgment creditors of the mortgagor, if the mortgages are based upon equitable matters which arose prior to the docketing of the judgments, notwithstanding the fact that the judgments were recovered before the execution of the second and subsequent mortgages; because, a judgment creditor is entitled only to such rights in the real estate as the judgment debtor rightfully possessed at the time the judgment was perfected.⁹⁰

§ 870. Preference of mortgage over mechanic's lien.—In the distribution of the proceeds arising from the sale of mortgaged premises, a mortgage executed prior to the performance of work by means of which a mechanic secures a

that its mortgage was inferior as a lien to the defendant's judgment. See *Sloan v. Central Iowa R. Co.* 62 Iowa, 728.

⁸⁸ *Ackerman v. Hunsicker*, 85 N. Y. 43, 39 Am. Rep. 621.

⁸⁹ *Union Dime Sav. Inst. v. Duryea*, 3 Hun (N. Y.) 210.

⁹⁰ *Tallman v. Farley*, 1 Barb. (N.

Y.) 280. As to when second mortgagees have priority over judgment creditors, whose judgments are prior to the recording of the mortgage, see *Tallman v. Farley*, 1 Barb. (N. Y.) 280; *Ray v. Adams*, 4 Hun (N. Y.) 332; *Cook v. Kraft*, 3 Lans. (N. Y.) 512, 515.

lien on the premises, is to be preferred by the referee to such mechanic's lien.⁹¹

§ 871. **Lien of judgment on surplus.**—A judgment recovered against the owner of the equity of redemption in mortgaged premises prior to a sale on foreclosure, will be a lien on the surplus moneys arising from such sale;⁹² but if the judgment is not perfected until after the sale is made, although docketed before the surplus moneys are distributed, it will not be a lien on such surplus.⁹³ A mistake in docketing a judgment, by stating erroneously the date on which it was recovered, has been held not to affect its lien, even against subsequent judgment creditors.⁹⁴

A judgment creditor, who is properly made a defendant while his judgment is alive, will not lose his right to share in the surplus by the fact that the lien of his judgment expires pending the action.⁹⁵ But a judgment creditor, whose judgment was not a lien on the mortgaged premises, will have no right to share in the proceeds of a sale of the decedent's real estate.⁹⁶ Thus, the vendee of land, who in an action for

⁹¹ *Oppenheimer v. Walker*, 3 Hun (N. Y.) 30.

⁹² See *Staton v. Webb*, 137 N. C. 35, 49 S. E. 55; *O'Connor as ex'x etc. v. Georgia Railroad Bank*, 121 Ga. 88, 48 S. E. 716.

⁹³ *Denham v. Cornell*, 67 N. Y. 556, 562; *Sweet v. Jacocks*, 6 Paige Ch. (N. Y.) 355, 31 Am. Dec. 352; *Douglass v. Huston*, 6 Ohio, 156. See *Shepard v. O'Neil*, 4 Barb. (N. Y.) 125; *Hull v. Spratt*, 1 Hun (N. Y.) 298; *Snyder v. Stafford*, 11 Paige Ch. (N. Y.) 71; *German Savings Bank v. Carrington*, 14 N. Y. Week. Dig. 475; affirmed 89 N. Y. 632; *Dempsey v. Bush*, 18 Ohio St. 376. Judgments over ten years old are not liens on the surplus. *Floyd v. Clark*, 2 Law

Bull. 36; *Perkins v. Stewart*, 75 Minn. 21, 77 N. W. 434. See *Nutt v. Cuming*, 155 N. Y. 309, 49 N. E. 880. See also *Terry v. Fuller*, 60 Misc. 562, 112 N. Y. Supp. 450.

⁹⁴ *Fish v. Emerson*, 44 N. Y. 376; *Sears v. Burnham*, 17 N. Y. 445; *Sears v. Mack*, 2 Bradf. (N. Y.) 394; *Edwards v. Sams*, 3 Ill. App. 168. See *Neele v. Berryhill*, 4 How. (N. Y.) Pr. 16; *Hodgen v. Guttery*, 58 Ill. 431; *Stedman v. Perkins*, 42 Me. 130.

⁹⁵ *Dempsey v. Bush*, 18 Ohio St. 376. See also *Terry v. Fuller*, 60 Misc. 562, 112 N. Y. Supp. 450; *Nutt v. Cuming*, 155 N. Y. 309, 49 N. E. 880.

⁹⁶ *Davis v. Davis*, 4 Redf. (N. Y.) 355

specific performance, has recovered a judgment for the purchase money paid, which was adjudged to be a lien, from the time of filing his *lis pendens*, on the surplus arising from a sale made upon the foreclosure of a prior mortgage, is entitled to priority in the payment of his judgment out of such surplus, as against a judgment creditor whose judgment was recovered after the filing of such *lis pendens*.⁹⁷

A judgment creditor, who purchases mortgaged premises at an execution sale under his judgment, is entitled to the surplus arising on a sale made under a prior mortgage, in preference to the holder of a junior judgment.⁹⁸ But a mortgagee, on recovering a judgment for deficiency against his mortgagor's administrator, cannot maintain an action to have his judgment declared a lien upon the surplus moneys arising upon the foreclosure of a mortgage on other lands given by the same mortgagor to another mortgagee.⁹⁹ The only remedy of such a judgment creditor, besides that against the personalty in the administrator's hands, is an action against the mortgagee's heirs or devisees; if they are insolvent, the court may direct the surplus to be held and applied in satisfaction of the judgment.¹

§ 872. What interests bound by lien of judgment.—The only interest bound by a judgment lien is the actual interest which the debtor has in the property at the time the judgment is docketed; when the judgment debtor has no interest in the premises other than the mere naked legal title, the lien of the judgment will not attach.² Thus, if

⁹⁷ *Hull v. Spratt*, 1 Hun (N. Y.) 298. But he is not entitled to interest thereon from the time of filing his *lis pendens*.

⁹⁸ *Shepard v. O'Neil*, 4 Barb. (N. Y.) 125; *Snyder v. Stafford*, 11 Paige Ch. (N. Y.) 71.

⁹⁹ *Fliess v. Buckley*, 24 Hun (N. Y.) 514, aff'd 90 N. Y. 286.

¹ *Fliess v. Buckley*, 24 Hun (N. Y.) 514, aff'd 90 N. Y. 286. See *ante*, § 236.

² *Hays v. Reger*, 102 Ind. 527; *Thomas v. Kennedy*, 24 Iowa. 397, 95 Am. Dec. 740; *Brown v. Pierce*, 74 U. S. (7 Wall.) 205, 19 L. ed. 134. See *Wheeler v. Wheedon*, 9 S. (1 Pet.) 443, 7 L. ed. 213.

a judgment debtor is in possession merely under a contract to purchase, a court of equity will permit the actual owner of the premises to show that the judgment debtor has no real interest therein.

A lien thus acquired constitutes no legal interest in the land itself, but is merely a general claim as distinguished from a specific lien securing a preference on subsequently acquired interests in the property;³ still, a court of equity will always protect the equitable rights of third parties existing at the time the judgment lien attaches to the property.⁴

§ 873. Satisfying judgments from surplus.—Where there are judgment liens upon the mortgaged premises when sold, such liens are, by the sale, transferred to the surplus and must be satisfied therefrom in the order of their priority, before the owner of the equity of redemption will be entitled to receive any part thereof;⁵ such lienors will be entitled to the payment of their claims before a widow can receive an assignment of her dower from the surplus.⁶

Where there is a surplus fund in court arising from a fore-

³ *White v. Carpenter*, 2 Paige Ch. (N. Y.) 217; *Baker v. Morton*, 79 U. S. (12 Wall.) 158, 20 L. ed. 265. See *Buchan v. Sumner*, 2 Barb. Ch. (N. Y.) 165, 47 Am. Dec. 305; *Ells v. Tousley*, 1 Paige Ch. (N. Y.) 280; *Massingill v. Downs*, 48 U. S. (7 How.) 767, 12 L. ed. 906; *Conard v. Atlantic Ins. Co.* 26 U. S. (1 Pet.) 443, 7 L. ed. 213.

⁴ *Ells v. Tousley*, 1 Paige Ch. (N. Y.) 280; *Snyder v. Martin*, 17 W. Va. 276, 41 Am. Rep. 671. See *Morris v. Mowatt*, 2 Paige Ch. (N. Y.) 586, 22 Am. Dec. 661; *Coster v. Bank of Georgia*, 24 Ala. 37; *O'Rourke v. O'Connor*, 39 Cal. 442; *Orth v. Jennings*, 8 Blackf. (Ind.)

420; *Churchill v. Morse*, 23 Iowa, 229, 92 Am. Dec. 422; *Walke v. Moody*, 65 N. C. 599; *Shryock v. Waggoner*, 28 Pa. St. 430; *Cover v. Black*, 1 Pa. St. 493; *Ashe v. Livingston*, 2 Bay (S. C.) 80; *Withers v. Carter*, 4 Gratt. (Va.) 407, 50 Am. Dec. 78; *Brown v. Pierce*, 74 U. S. (7 Wall.) 205, 19 L. ed. 134.

⁵ *Eddy v. Smith*, 13 Wend. (N. Y.) 488. See also *Terry v. Fuller*, 60 Misc. 562, 112 N. Y. Supp. 450; *Hunneman v. Lowell Institution for Savings*, 205 Mass. 441, 91 N. E. 526.

⁶ *New York Life Ins. Co. v. Mayer*, 19 Abb. (N. Y.) N. C. 92. See *post*, § 879.

closure against the executors or administrators of a deceased mortgagor, a creditor who has obtained a proper decree in a surrogate's court will be preferred in its distribution to legatees claiming the fund.⁷

§ 874. **Specific lien of judgment and executory contract.**—Judgment creditors who obtain a specific lien upon the land before foreclosure, are entitled to priority of payment out of the surplus according to the dates of their respective judgments.⁸ Where mortgaged premises have been sold upon execution under a judgment junior to the mortgage, and the time for redemption has not expired at the time of the foreclosure sale, the general lien of the judgment will become a specific lien upon the surplus to the extent of the purchaser's bid on the execution sale, and of the interest thereon.⁹

But where a mortgagee obtained a decree of foreclosure, by virtue of which the property was sold, and being also a judgment creditor of the mortgagor, had an execution levied on the mortgaged premises, to which, however, the mortgagor had no title at the time of the levy, it was held that such judgment creditor was not entitled to participate in the surplus, even though the mortgagor, during the pendency of the foreclosure suit, became the owner of the equity of redemption.¹⁰

It is thought that an agreement to execute a mortgage on particular lands described therein, is in equity a specific lien

⁷ *Clark's Case*, 15 Abb. (N. Y.) Pr. 227.

⁸ *Purdy v. Doyle*, 1 Paige Ch. (N. Y.) 558. As to the proposition that specific liens, whether legal or equitable, secured on mortgaged premises before the sale, will be respected by courts of equity, see *Codwise v. Gelston*, 10 Johns. (N. Y.) 522; *Atlas Bank v. Nahant Bank*, 44 Mass. (3 Met.) 581; *Tenant v. Stoney*, 1 Rich. (S. C.) Eq.

222, 44 Am. Dec. 213; *Fremoult v. Dedire*, 1 P. Wms. 429; *Finch v. Earl of Winchelsea*, 1 P. Wms. 277; *Lovegrove v. Cooper*, 2 Sm. & G. 271; *Wilson v. Fielding*, 2 Vern. 763, 10 Mod. 426, Adams Eq. 256, 1 Story Eq. Jur. §§ 551, 553, 2 White & T. & L. Cas. pt. 1, 290.

⁹ *Snyder v. Stafford*, 11 Paige Ch. (N. Y.) 71.

¹⁰ *Smith v. Smith*, 13 Mich. 258.

on such lands, and that in the distribution of the surplus arising on a sale under a prior mortgage, it will be preferred to subsequent judgment liens.¹¹ While an oral agreement to execute a mortgage is executory and within the statute of frauds and not enforceable, yet if the promisor has actually completed the agreement by properly executing and delivering a formal mortgage, it will become as effective for all purposes as if it had been reduced to writing originally.¹²

§ 875. Judgment by confession as an indemnity.—A judgment by confession, given to secure and indemnify a party as a surety, is a lien upon the equity of redemption of the defendant's mortgaged premises, and will be entitled to payment out of the surplus in the order of its lien, although the party may not have been damnified. The security will be transferred from the equity of redemption to the surplus arising on the sale, and its lien can be discharged only by the full discharge of the surety from all liability.¹³

§ 876. Judgment against sheriff.—It has been held that where a judgment creditor is entitled to the surplus, or a part thereof, the fact that he has recovered a judgment against the sheriff for not returning his execution upon the judgment will not affect his claim to the surplus, nor the claim of his assignee of the first judgment, where such judgment has been assigned, in the absence of a showing that the assignment was made for the benefit of the sheriff; the mere fact that the assignee purchased the judgment at the request of the sheriff does not show that it was purchased for the sheriff's benefit.¹⁴

¹¹ See *Otis v. Sill*, 8 Barb. (N. Y.) 119; *White v. Carpenter*, 2 Paige Ch. (N. Y.) 217.

¹² *Dodge v. Wellman*, 1 Abb. App. Dec. (N. Y.) 512; *Burdick v. Jackson*, 7 Hun (N. Y.) 490; *Arnold v. Patrick*, 6 Paige Ch. (N.

Y.) 310. See *Siemon v. Schurck*, 29 N. Y. 598.

¹³ *Lansing v. Clapp*, 3 How. (N. Y.) Pr. 238. See *ante*, § 871.

¹⁴ *Lansing v. Clapp*, 3 How. (N. Y.) Pr. 238.

§ 877. Judgment confessed by one member of a firm.—

A judgment confessed by two members of a firm of three, for a partnership debt, has a priority of lien over a subsequent judgment recovered against all the members of the firm.¹⁵

In a proceeding under the general rules of practice of the New York supreme court,¹⁶ to ascertain the priorities of the several liens upon the surplus moneys arising upon the foreclosure of a mortgage, the rule in equity as to the application of partnership and individual property among firm and individual creditors does not apply, but the rule of law controls which gives a judgment creditor of the firm, who has acquired a lien upon the lands of a partner by docketing the judgment, a claim upon the surplus superior to the claim of a junior judgment creditor of the partner.¹⁷

§ 878. Married woman's equitable right to surplus.—

It has been said that upon the foreclosure of a mortgage upon real property belonging to a married woman, the surplus brought into court is subject to its jurisdiction as a court of equity; and that, independently of the married woman's acts,¹⁸ the court will not allow the fund to be reached by the husband's creditors without first making suitable provision for the wife and her children.¹⁹ It seems that where the surplus is small and not more than sufficient to support her, the whole thereof should be paid to the wife.²⁰

In those states where the right of homestead prevails, a married woman's right to demand a portion of such surplus in

¹⁵ *Stevens v. Bank of Central N. Y.* 31 Barb. (N. Y.) 290.

¹⁶ N. Y. Supreme Court Rule 64.

¹⁷ *Meech v. Allen*, 17 N. Y. 300, 72 Am. Dec. 465; *New York Life Ins. Co. v. Mayer*, 19 Abb. (N. Y.) N. C. 92; *Averill v. Loucks*, 6 Barb. (N. Y.) 470.

¹⁸ N. Y. Laws of 1848, chap. 200, 1849, chap. 375.

¹⁹ See *Udall v. Kenney*, 3 Cow. (N. Y.) 590; *Sleight v. Read*, 18 Barb. (N. Y.) 159, 9 How. (N. Y.) Pr. 278; *Dumond v. Magee*, 4 Johns. Ch. (N. Y.) 318; *Wiswall v. Hall*, 3 Paige Ch. (N. Y.) 313; *Mumford v. Murray*, 1 Paige Ch. (N. Y.) 620.

²⁰ *Sleight v. Read*, 18 Barb. (N. Y.) 159, 9 How. (N. Y.) Pr. 278.

lieu thereof will be protected. Thus the supreme court of Ohio, in the case of *Niehaus v. Faul*,²¹ say that in a case where two lots are separately mortgaged, by the sale and confirmation of the first, where the owner had a right of homestead, her ownership was divested; and if the surplus arising from its sale on foreclosure was insufficient, she was entitled, under the statute,²² to demand an allowance in lieu of her homestead exemption out of the surplus arising from the sale of other lands. The right to demand such an allowance out of the proceeds of land sold under foreclosure, in lieu of a homestead, is to be determined by the state of facts at the time the surplus arising from the sale was finally disposed of by the courts.²³

Where a surplus arises on the foreclosure of property held by the husband and wife as tenants by the entirety, it will be held under the control of the court to await the severance of the estate by the death of one of the parties, when it will become available in satisfaction of judgments previously taken against the survivor.²⁴

§ 879. Dower in surplus moneys. — Since surplus moneys arising upon the sale of mortgaged lands take the place of the lands for parties having liens or vested rights therein, the widow of the owner of the equity of redemption is entitled to dower in the surplus the same as she was in the land before the sale.²⁵ But where she unites with her husband in the execution of a mortgage on real estate belonging to him, and the property is afterwards sold under such mort-

²¹ 43 Ohio St. 63, 1 N. E. 87.

²² Ohio Rev. Stat. § 5441.

²³ *Niehaus v. Faul*, 43 Ohio St. 63, 1 N. E. 87.

²⁴ *Servis v. Dorn*, 76 N. J. Eq. 241, 76 Atl. 246.

²⁵ See *Matthews v. Duryee*, 17 Abb. (N. Y.) Pr. 256, affirmed 4 Keyes (N. Y.) 525; *Vartie v. U-*

derwood, 18 Barb. (N. Y.) 564;

Denton v. Nanny, 8 Barb. (N. Y.)

618; *Titus v. Neilson*, 5 Johns. Ch.

(N. Y.) 458; *Tarbele v. Tarbele*,

1 Johns. Ch. (N. Y.) 45; *Elmen-*

dorf v. Lockwood, 4 Lans. (N. Y.)

393; *Kling v. Ballentine*, 40 Ohio St.

394.

gage, she will be entitled to dower only in the surplus after the payment of the mortgage,²⁶ because her mortgage will operate to its extent to extinguish her right.²⁷

The right of the wife of a mortgagor to dower in the surplus remaining after discharging the mortgage lien, was once doubted in those cases where the husband survived the foreclosure sale but died before the distribution of the surplus;²⁸ but it is now well settled in New York²⁹ and in other states,³⁰ that where a widow joins her husband in a mortgage on land of which he was seized, she is entitled to dower in the surplus moneys arising from the foreclosure sale. She will have a right of dower in the equity of redemption merely, however, and not in the whole premises.³¹

It is said that if a husband dies after a foreclosure sale and

²⁶ *Smith v. Jackson*, 2 Edw. Ch. (N. Y.) 28; *Titus v. Neilson*, 5 Johns. Ch. (N. Y.) 458; *Hawley v. Bradford*, 9 Paige Ch. (N. Y.) 200, 37 Am. Dec. 390; *Bank of Commerce v. Owens*, 31 Md. 320, 1 Am. Rep. 63; *Hinchman v. Stiles*, 9 N. J. Eq. (1 Stockt.) 361; *Hartshorne v. Hartshorne*, 2 N. J. Eq. (1 H. W. Gr.) 349.

²⁷ *Elmendorf v. Lockwood*, 4 Lans. (N. Y.) 393. But see *Kauffman v. Peacock*, 115 Ill. 212, 3 N. E. 749. In the case of *New York Life Ins. Co. v. Mayer*, 19 Abb. (N. Y.) N. C. 92, it was questioned whether a claim of the wife to dower, not being a vested interest in the lands or a lien upon them, which is cut off by foreclosure, can be entertained in proceedings for the distribution of the surplus, citing *Dunning v. Ocean Nat. Bank*, 61 N. Y. 497, 10 Am. Rep. 293; *Mutual Life Ins. Co. of N. Y. v. Truchtnicht*, 3 Abb. (N. Y.) N. C. 135; *Matthews v. Duryee*, 45 Barb. (N. Y.) 69; *German Savings Bank*

v. Sharer, 25 Hun (N. Y.) 409; *Fliess v. Buckley*, 24 Hun (N. Y.) 514, aff'd in 90 N. Y. 286.

²⁸ *Frost v. Peacock*, 4 Edw. Ch. (N. Y.) 678.

²⁹ *Malloney v. Horan*, 49 N. Y. 111, 10 Am. Rep. 335; *Matthews v. Duryee*, 45 Barb. (N. Y.) 69, aff'd 3 Abb. App. Dec. (N. Y.) 220, 17 Abb. (N. Y.) Pr. 256; *Denton v. Nanny*, 8 Barb. (N. Y.) 618; *Blydenburgh v. Northrop*, 13 How. (N. Y.) Pr. 289; *Titus v. Neilson*, 5 Johns. Ch. (N. Y.) 452; *Bell v. Mayor, etc. of New York*, 10 Paige Ch. (N. Y.) 49; *Hawley v. Bradford*, 9 Paige Ch. (N. Y.) 200, 37 Am. Dec. 390.

³⁰ *Hinchman v. Stiles*, 9 N. J. Eq. (1 Stockt.) 454; *Taylor v. Fowler*, 18 Ohio, 567, 51 Am. Dec. 469; *Rands v. Kendall*, 15 Ohio, 671; *Fox v. Pratt*, 27 Ohio St. 512; *Culver v. Harper*, 27 Ohio St. 464; *State Bank of Ohio v. Hinton*, 21 Ohio St. 509.

³¹ *Hawley v. Bradford*, 9 Paige Ch. (N. Y.) 200, 37 Am. Dec. 390.

the distribution of the surplus, the wife cannot claim an interest in such surplus, but that if he dies after the sale and while the surplus, or any part of it, is within the control of the court, she will be dowable of the surplus so far as her right can be equitably paid from the portion remaining undistributed. If the husband is living, one-third of such surplus should be invested for her during their joint lives; if he is dead, she will be entitled to the income of one-third thereof for life.³²

A widow is dowable only in that portion of the surplus which still remains in the hands of the court at the time her application therefor is made; if any of those interested in the surplus have received their portion, they cannot be called upon to refund it; neither can those who have not received their share be required to suffer loss by reason of the demand made.³³

The supreme court of the District of Columbia, *In re Thompson*,³⁴ say that where a deed of trust in which the grantor's wife joined, releasing her dower, directed the trustees to sell upon default and pay the surplus, after paying the debt, to the grantor, his executors, administrators, or assigns, and the property was sold under the trust after the grantor's death, the widow is not entitled to any of the surplus, which is distributable to the heirs.

§ 880. Inchoate right of dower.—Some courts have gone to the extent of protecting the inchoate right of dower of the wife during coverture in the surplus from a mortgage sale by permitting her, as against subsequent lienors, to have one-third of such surplus invested for her benefit, and kept invested during the joint lives of herself and hus-

³² *Vartie v. Underwood*, 18 Barb. (N. Y.) 561; *Denton v. Nanny*, 8 Barb. (N. Y.) 618; *Matthews v. Duryee*, 4 Keyes (N. Y.) 525. In Indiana, Iowa and possibly some Mortg. Vol. II.—79.

other states, she is entitled to one-third in fee.

³³ *State Bank of Ohio v. Hinton*, 21 Ohio St. 509.

³⁴ 6 Mackey (D. C.) 536.

band, and the interest to be subject to the order of the court during the life of the husband and to be paid to her during her life, in case she survives him.³⁵

In the case of *Kauffman v. Ellis*,³⁶ the question of a wife's right to inchoate dower in surplus was fully discussed by the supreme court of Illinois. In that case it was contended on behalf of the appellant that, by joining her husband in the execution of the deed of trust under which the property was sold and the surplus arose, she only released her inchoate right of dower to the mortgagee, and, as the attaching creditors did not claim under the mortgagee, she was entitled to be protected in her inchoate dower rights as against them. It was claimed by the appellees that where a wife unites with her husband in the execution of a mortgage or deed of trust, releasing her inchoate dower, and a sale occurs under such mortgage or deed of trust during the lifetime of the husband, the surplus money arising from such sale becomes personal property, payable to the husband, and the wife has no interest whatever therein. In discussing the question the court say: "The question presented is not entirely free from difficulty; it is one upon which the authorities are not entirely harmonious. When there has been marriage, seisin and the death of the husband, the right of the dower is complete and may then be enforced; but where there has been marriage and seisin, and death of the husband has not occurred, an inchoate right of dower only exists. In this case it is clear that appellant had an inchoate right of dower in the equity of redemp-

³⁵ *Vartie v. Underwood*, 18 Barb. (N. Y.) 561; *Citizens' Sav. Bank v. Mooney*, 26 Misc. 67, 56 N. Y. Supp. 548. See *Malloney v. Horan*, 49 N. Y. 111, 10 Am. Rep. 335; *Mills v. VanVoorhies*, 20 N. Y. 412; *Denton v. Nanny*, 8 Barb. (N. Y.) 618; *Blydenburgh v. Northrup*, 13 How. (N. Y.) Pr. 289; *Matthews v. Duryee*, 4 Keyes (N. Y.) 525; *Veeland v. Jacobus*, 19 N. J. Eq. (4

C. E. Gr.) 231; *Kauffman v. Peacock*, 115 Ill. 212, 3 N. E. 749. But see *Grube v. Lilenthal*, 51 S. C. 442, 29 S. E. 230.

In Indiana the wife is entitled to the whole surplus where it is less than one-third of the value of the property. *Bartmess v. Holliday*, 27 Ind. App. 544, 61 N. E. 750.

³⁶ 115 Ill. 212, 3 N. E. 749.

tion of the premises, of which she could not have been deprived by any creditor of her husband if she had paid off the deed of trust; but this she failed to do, and suffered the land to be sold under the deed of trust and converted into money. Under such circumstances has she any dower rights in the surplus money arising from the sale?

"In *Cook v. Dillon*,³⁷ in a case somewhat analogous to the case of *Hoffman v. Ellis*, the court held that surplus money in the hands of a trustee after satisfying the deed of trust, was the personal property of the mortgagor, liable to be seized in payment of his debts. The same doctrine was announced in *Dean v. Phillips*,³⁸ and in *Newhall v. Lynn Savings Bank*."³⁹

The court in the course of the opinion in *Kauffman v. Ellis*, say; "The appellant has cited *Denton v. Nanny*,⁴⁰ as a leading authority sustaining her view of the case. The decision sustains the position of the appellant, and the doctrine announced was approved in *Vartie v. Underwood*.⁴¹ The appellant also relies upon *Vreeland v. Jacobus*,⁴² *Wheeler v. Kirtland*,⁴³ *De Wolf v. Murphy*,⁴⁴ and *Unger v. Leiter*.⁴⁵ We are not inclined to follow the rule laid down in the cases found in *Barbour's Reports*. The court in which the cases were decided was one of learning and ability, but it was not a court of last resort. The other cases cited and relied upon, seem to sustain appellant's position; but we do not think they are in harmony with the current of authority on the subject, Cooley says: ⁴⁶ 'The inchoate right of dower does not become property or anything more than a mere expectancy at any time before it is consummated by the husband's death.

³⁷ 9 Iowa, 412, 74 Am. Dec. 354.

³⁸ 17 Ind. 409.

³⁹ 101 Mass. 428, 432, 3 Am. Rep. 387.

⁴⁰ 8 Barb. (N. Y.) 618.

⁴¹ 18 Barb. (N. Y.) 564.

⁴² 19 N. J. Eq. (4 C. E. Gr.)

231.

⁴³ 27 N. J. Eq. (12 C. E. Gr.) 534.

⁴⁴ 11 R. I. 630.

⁴⁵ 32 Ohio St. 210.

⁴⁶ Const. Lim. (10th ed.) 442.

In neither curtesy nor dower does a marriage alone give a vested right; it gives only a capacity to acquire a right. Here, the husband of appellant was living, and whether the inchoate right of dower would ever become more than a mere expectancy would depend upon the fact, which might never occur, that she would survive him, and we think it would be against sound public policy to tie up a fund in the hands of trustees to abide such an uncertain contingency as that relied upon by complainant in her bill. Again: The complainant executed the deed of trust and relinquished all her dower rights, and contracted that the property might be sold and converted into money; it is true, if she had paid off the mortgage, in the event that she survived her husband, she would be entitled to dower in the property; but the effect of her deed was that the real property in which she might be entitled to dower, might be converted into personal property, and, when thus converted, her inchoate rights would terminate.

“In our judgment, the surplus money arising from the sale in the hands of the trustees was personal assets which belonged to complainant’s husband, upon which she had no claim whatever, and, as such, it was liable to be reached by the creditor of August Kauffman in like manner as personal property which he had acquired from any other source. Land articulated to be sold and turned into money is reputed money.⁴⁷ By executing the mortgage, and permitting the lands to be sold, appellant consented that the real estate should lose its character, as such, and assume the character of personal property; and when it assumed this new character, it would be controlled and governed by the laws in relation to personal and not real property. In the Indiana case, *Dean v. Phillips*,⁴⁸ it is said: We do not perceive how Bennett’s wife had any interest in the residue of the money after paying the mortgage debt. She executed the mortgage with her husband; otherwise, had she survived him, she might have been entitled to

⁴⁷ 2 Story Eq. § 1212.

⁴⁸ 17 Ind. 409.

one-third of the land. But the premises have been sold upon the mortgage to which she was a party; her right to or contingent interest in the land has gone. The excess of the money arising from the sale clearly all belongs to Bennett and not to his wife; hence, it might properly be applied to the payment of his debts. In *Newhall v. Lynn Savings Bank*,⁴⁹ the court held that the wife of the owner of the estate subject to a mortgage, valid against her, has no right as against her husband or his assignee in bankruptcy in the proceeds of sale of the estate made by the mortgagee for breach of condition, and under power in the mortgage deed."⁵⁰

In the case of the *New York Life Insurance Company v. Mayer*,⁵¹ it was held that the claim of the wife of a mortgagor, who joined in the execution of the mortgage, upon the surplus moneys arising on a foreclosure, for the value of her inchoate right of dower, is superior to the claims of judgment creditors of the mortgagor, notwithstanding the fact that there was a provision in the mortgage for the return of the surplus, if any, to the mortgagor, his heirs or assigns.⁵²

§ 881. Investment of dower in surplus—Payment of gross sum.—It is thought that where the widow of a mortgagor, or owner of the equity of redemption, who has answered as such and submitted to the decree of the court,

⁴⁹ 101 Mass. 432, 3 Am. Rep. 387.

⁵⁰ See *ante*, §§ 878, 879, 880.

⁵¹ 19 Abb. (N. Y.) N. C. 92.

⁵² *Butler v. Smith*, 20 Ore. 126, 25 Pac. 381. See *Simar v. Canaday*, 53 N. Y. 298, 13 Am. Rep. 523; *Mills v. VanVoorhies*, 20 N. Y. 412; *Matthews v. Duryee*, 3 Abb. (N. Y.) App. Dec. 220, affirming 45 Barb. (N. Y.) 69, 17 Abb. (N. Y.) Pr. 256; *Vartie v. Underwood*, 18 Barb. (N. Y.) 561; *Denton v. Nanny*, 8 Barb. (N. Y.) 618; *Douglas v. Douglas*, 11 Hun (N. Y.) 406; *Jackson v. Edwards*, 7 Paige Ch.

(N. Y.) 386; *Hawley v. Bradford*, 9 Paige Ch. (N. Y.) 200, 37 Am. Dec. 390. Contra, *Aikman v. Harsell*, 98 N. Y. 186; *Moore v. Mayor*, 8 N. Y. 110, 59 Am. Dec. 473; *Frost v. Peacock*, 4 Edw. Ch. (N. Y.) 678; *Titus v. Neilson*, 5 Johns. Ch. (N. Y.) 453; *Bell v. Mayor*, &c. 10 Paige Ch. (N. Y.) 55.

But it is thought that her rights cannot be litigated in an action to recover the fund, in a case where she is not a party. *Butler v. Smith*, 20 Org. 126, 25 Pac. 381.

is entitled to dower in the surplus proceeds of the sale of the mortgaged premises, one-third thereof may be ordered to be invested at interest for her benefit;⁵³ or, under the rules of the supreme court,⁵⁴ such widow may consent to accept a gross sum in lieu of the annual interest or income for life from the one-third so invested, and such gross sum shall be estimated according to the then value of an annuity of five per centum on the principal sum, during the probable period of her life as ascertained from the Carlisle Table of Mortality.⁵⁵

Where the husband is living, the value of the wife's inchoate right of dower is ascertained by computing the value of an annuity for her life, in one-third of the proceeds of the estate to which her inchoate right of dower attaches, and deducting therefrom the value of a similar annuity for his life; the difference between these two sums will be the present value of her inchoate right of dower.⁵⁶

§ 882. Homestead right in surplus.—It has been held that where a mortgaged homestead is sold for more than enough to pay the mortgage debt, the surplus, to the extent allowed by statute for a homestead, should be delivered to the debtor for the purchase of another homestead; in case of his death, such portion should be invested in a home for his widow or his children.⁵⁷ It is believed where a sale is made under a mortgage containing a waiver of exemption, that the mortgagor is, nevertheless, entitled to the exemption

⁵³ *Tabele v. Tabele*, 1 Johns. Ch. (N. Y.) 45.

⁵⁴ N. Y. Supreme Court Rule 70.

⁵⁵ N. Y. Supreme Court Rule 70. See *Schell v. Plumb*, 55 N. Y. 592, 16 Abb. (N. Y.) Pr. N. S. 19, 46 How. (N. Y.) Pr. 19; *Winslow v. McCall*, 32 Barb. (N. Y.) 249; *Davis v. Standish*, 26 Hun (N. Y.) 616; *Tabele v. Tabele*, 1 Johns. Ch.

(N. Y.) 45; *Matthews v. Duryee*, 4 Keyes (N. Y.) 525; *Wager v. Schuyler*, 1 Wend. (N. Y.) 553.

⁵⁶ *Jackson v. Edwards*, 7 Paige Ch. (N. Y.) 386, 408. See *Doty v. Baker*, 11 Hun (N. Y.) 225; *Gordon v. Tweedy*, 74 Ala. 232, 49 Am. Rep. 813.

⁵⁷ *McTaggart v. Smith*, 14 Bush (Ky.) 414.

allowed by law to heads of families out of the surplus proceeds of such sale, as against subsequent judgment creditors.⁵⁸

The Illinois court of appeals, in the case of *Trodden v. Safford*,⁵⁹ say that where the mortgagee purchases the homestead of the mortgagor at a sale under foreclosure, he cannot apply the surplus on other claims against the mortgagor, as to which the right of homestead has not been waived.

§ 883. **Where claim of collateral assignee less than mortgage.**—A mortgagee holding several notes secured by mortgage may assign the security to an assignee of one of the notes, so as to give him a preference in the application of the proceeds realized from a sale of the mortgaged premises; and where the assignment of the mortgaged premises purports to “bargain, sell and assign” the same to secure the payment of the note so assigned, it is a transfer of the entire legal estate or interest of the mortgagee therein, and he will retain only an equitable interest in the surplus after satisfying the amount due to the assignee.⁶⁰

Where a bond and mortgage are assigned as collateral security for a loan, with an agreement on the part of the lender, that on payment of the mortgage he will account for the excess of the principal over and above the amount of the loan, and the mortgage is foreclosed by the lender without making the borrower a party to the action and the premises are bid in by the lender, the equitable interest which the borrower had in the mortgage will attach to the land, and he will be entitled to the surplus in case of a sale thereof by the lender for more than the amount of his claim.⁶¹

If one mortgagor is surety for another, where they own undivided shares in the property, the surety will have a

⁵⁸ *Quinn's Appeal*, 86 Pa. St. 447;
Hill v. Johnson, 29 Pa. St. 362.

⁵⁹ 21 Ill. App. 240.

⁶⁰ *Solberg v. Wright*, 33 Minn.
224.

⁶¹ *Dalton v. Smith*, 86 N. Y. 176;
Hoyt v. Martense, 16 N. Y. 231;
Slee v. Manhattan Ins. Co. 1 Paige
Ch. (N. Y.) 48.

right to require that the share of his principal shall be sold first on a foreclosure, if enough can be realized in that way to pay the mortgage debt; if the entire premises are sold and a surplus is produced, the surety will be entitled to have such surplus, to the extent of his entire undivided share, paid to him.⁶²

§ 884. Purchase of part of premises by mortgagee.—

It has been said that where one who holds a mortgage, purchases an absolute title to a portion of the premises, and afterwards forecloses the mortgage and sells the whole premises under a decree, he will be entitled in the distribution of the surplus, not to the amount which he paid for the portion purchased by him, but only to so much as his portion ratably contributed to the price brought by the whole tract.⁶³

§ 885. Interest of lessee for years in surplus.—Where a tenant for years holds under a lease without covenants, which is subject to a mortgage, he will not be entitled to share in the surplus arising from the sale upon the foreclosure of such mortgage.⁶⁴ But a lessee for years of mortgaged premises, holding under a lease containing a covenant for quiet enjoyment, is entitled, on the contrary, to receive from the surplus moneys arising on the sale, the value of the use of the premises during the remainder of his term, less the rents reserved and other payments to be made by him under the lease.⁶⁵

In the absence of proof that the value of the leasehold is in excess of the rents reserved, or that it has such value, the lessee of mortgaged premises is not entitled to receive any

⁶² *Erie County Sav. Bank v. Roop*, 80 N. Y. 591. See *Bank of Albion v. Burns*, 46 N. Y. 170; *Smith v. Townsend*, 25 N. Y. 479; *Vartie v. Underwood*, 18 Barb. (N. Y.) 561; *Neimcewicz v. Gahn*, 3 Paige Ch. (N. Y.) 614; *Loomer v. Wheelwright*, 3 Sandf. Ch. (N. Y.) 135.

⁶³ *Frost v. Peacock*, 4 Edw. Ch (N. Y.) 678.

⁶⁴ *Burr v. Stenton*, 43 N. Y. 462

⁶⁵ *Clarkson v. Skidmore*, 46 N. Y. 297; *Ely v. Collins*, 45 Misc. 255, 92 N. Y. Supp. 160.

portion of the surplus arising from a sale thereof, because in the absence of such proof, the presumption is that the rent reserved is the fair value of the use and that no injury is sustained by the lessee.⁶⁶ Where, therefore, a lessee and the owner of the equity of redemption were the only claimants for the surplus arising on a foreclosure sale, and no evidence was produced by the former tending to show that the leasehold estate had any value in excess of the rents, it was held that the whole surplus was properly awarded to the owner.⁶⁷

§ 886. **Mechanic's lien.**—The inchoate rights of mechanics and material men under the statute giving them liens, are entitled to share in the surplus funds arising on a mortgage foreclosure sale, although such liens may not be established by judgment;⁶⁸ but they will always be inferior to the lien of a prior *bona fide* mortgage.⁶⁹

The delivery and acceptance of a deed to premises, "subject to all contracts outstanding relating to said premises and buildings" then in course of erection, and all "moneys now due or to grow due on account of said contracts or either of them, and all incumbrances of whatsoever nature and kind now a lien upon said premises or any part thereof," has been held to charge the premises with an equitable lien in favor of the mechanics and material men for their claims; and such lien will attach to the surplus moneys arising on the foreclosure of a prior mortgage.⁷⁰

But such a clause in a deed covers only claims in existence

⁶⁶ *Larkin v. Misland*, 100 N. Y. 212; *Clarkson v. Skidmore*, 46 N. Y. 297, 303.

⁶⁷ *Larkin v. Misland*, 100 N. Y. 212.

⁶⁸ *Livingston v. Mildrum*, 19 N. Y. 440. See *Bergen v. Snedeker*, 8 Abb. (N. Y.) N. C. 50, 56. As to the right to the surplus under a mechanic's lien not continued by the

court, after the expiration of one year, where the premises are sold under foreclosure, see *Emigrant Industrial &c. Bank v. Goldman*, 75 N. Y. 127.

⁶⁹ See *Oppenheimer v. Walker*, 3 Hun (N. Y.) 30. See also *Hall v. Thomas*, 111 N. Y. Supp. 979.

⁷⁰ *Crombie v. Rosenstock*, 19 Abb. (N. Y.) N. C. 312.

at the time of the execution of the deed, and not claims arising pursuant to contracts made after the transfer. It is immaterial that such claims arise upon contracts with the husband of the grantor for the erection of the building, so that the grantor is not personally liable for their payment; the consideration for the equitable liens so created is the transfer of the land.⁷¹

§ 887. Rights of cestuis que trust in surplus.—Beneficiaries are entitled to share in the surplus arising on mortgage foreclosure. Thus, it has recently been said the beneficiaries under a trust deed or mortgage on lands by one not holding the title may affirm the sale of the mortgagee and recover the proceeds in his hands; in such case, however, the mortgagee is entitled to retain the expenses of the sale and any payments he may have been called upon to make for the purposes of the trust.⁷²

In the distribution of the surplus arising from the sale of mortgaged premises made under the foreclosure of a mortgage executed by one who held the legal title to the premises as trustee *ex maleficio*, the owner of the equitable title under such trust *ex maleficio* is entitled to claim the surplus after the payment of the mortgage debt, to the exclusion of judgment creditors of the mortgagor.⁷³

Where the grantee in a deed of trust subsequently conveyed the premises by a deed of warranty and afterwards transferred them again by a deed of trust, the beneficiary in the latter knowing of the warranty deed, and upon a foreclosure under the first incumbrance there was a surplus, the grantor being insolvent and a non-resident, it was held that the grantee in the warranty deed was entitled to the surplus in preference to the beneficiary in the deed of trust.⁷⁴

⁷¹ *Crombie v. Rosenstock*, 19 Abb. (N. Y.) N. C. 312.

⁷² *Re Champion* (C. A.) 1893, 1 Ch. 101.

⁷³ *Landell's Appeal*, 105 Pa. St. 152.

⁷⁴ *Johnson v. Wilson*, 77 Mo. 639.

§ 888. **Lien for attorney's fees on surplus.**—The lien of an attorney on a judgment for his fees extends to the surplus moneys arising on a foreclosure, as such fees are a part of the judgment,⁷⁵ and will be protected.⁷⁶ In the case of *Atlantic Savings Bank v. Hetterick*,⁷⁷ the order of reference for the distribution of the surplus moneys on a foreclosure sale directed that the amount due to the claimant thereof be ascertained by the referee, and also the amount due to any other person having a lien on such surplus moneys. The court held that the lien of the attorney who procured the judgment for the claimant, upon which he founded his claim to the surplus moneys and another judgment decreeing it to be paid out of such moneys, was properly sustained.⁷⁸

§ 889. **Disposition of surplus moneys not applied for.**—The New York Code of Civil Procedure⁷⁹ provides that “if there is any surplus of the proceeds of the sale of mortgaged premises, after paying the expenses of the sale and satisfying the mortgage debt and the costs of the action, it must be paid into court for the use of the person or persons entitled thereto.”⁸⁰ If any part of the surplus remains in court for the

⁷⁵ *Atlantic Savings Bank v. Hetterick*, 5 T. & C. (N. Y.) 239. In the case of *Kennedy v. Brown*, 50 Mich. 336, the mortgagee bid off the premises on foreclosure at a figure exceeding the amount of the debt, costs, taxes, and insurance by about \$40; the mortgage provided for an attorney's fee of \$50; the court held that the mortgagee was bound to pay over the surplus of \$40 to the sheriff for the benefit of the owner of the equity of redemption, and that if he did not do so, the latter could sue him for money had and received to his use.

⁷⁶ *Atlantic Savings Bank v. Hiler*, 3 Hun (N. Y.) 209; *Atlantic Sav-*

ings Bank v. Hetterick, 5 T. & C. (N. Y.) 239.

⁷⁷ 5 T. & C. (N. Y.) 239.

⁷⁸ The claimant having appeared before the referee and been heard, without objecting to the examination of the attorney's account on which his demand was based, it was held, that the proceeding amounted to an arbitration, if not a reference, to determine the attorney's demand, by which the claimant was bound. *Atlantic Savings Bank v. Hetterick*, 5 T. & C. (N. Y.) 239.

⁷⁹ N. Y. Code Civ. Proc. § 1633.

⁸⁰ The surplus moneys derived from a sale under foreclosure, belong to the mortgagor or owner of

period of three months, the court must, if no application has been made therefore, and may, if an application therefor is pending, direct it to be invested at interest, for the benefit of the person or persons entitled thereto, to be paid upon the direction of the court.”⁸¹

The rules of the supreme court⁸² provide for the deposit and investment of surplus moneys, the taking of securities therefor, and the inspection of the county treasurer's and chamberlain's accounts thereof.

the equity of redemption, and not to the purchaser on the foreclosure sale. *Day v. Town of New Lots*, 11 N. Y. State Rep. 361.

⁸¹ N. Y. Code Civ. Proc. § 1633. See *White v. Bogart*, 73 N. Y. 256; *Dunning v. Ocean Nat. Bank*, 61 N. Y. 497, 19 Am. Rep. 293; *Mutual Life Ins. Co. of N. Y. v. Truchtnicht*, 3 Abb. (N. Y.) N. C. 135; *Tator v. Adams*, 20 Hun (N. Y.)

131; *Savings Bank of Utica v. Wood*, 17 Hun (N. Y.) 133; *Hurst v. Harper*, 14 Hun (N. Y.) 280; *Savings Institution v. Osley*, 4 Hun (N. Y.) 657; *Oppenheimer v. Walker*, 3 Hun (N. Y.) 30; *Atlantic Savings Bank v. Hiler*, 5 T. & C. (N. Y.) 239, 3 Hun (N. Y.) 209.

⁸² N. Y. Supreme Court Rules 69, 70.

CHAPTER XXXIII.

PROCEEDINGS ON SURPLUS MONEYS.

PRACTICE—DISTRIBUTION BY SURROGATE'S AND SUPREME COURTS—APPLICATION FOR SURPLUS—APPOINTING REFEREE—HIS POWERS AND DUTIES—WHAT MAY BE LITIGATED—TESTIMONY SIGNED—REFEREE'S REPORT—CONFIRMATION—ORDER FOR DISTRIBUTION—APPEAL.

- § 890. Distribution of surplus by surrogate.
- § 891. Distribution by supreme court.
- § 892. Action to enforce claim to surplus.
- § 893. Recovering surplus wrongfully paid.
- § 894. Application for surplus moneys.
- § 895. Who entitled to notice—How served.
- § 896. Certificate and proof of depositing surplus.
- § 897. Appointment of referee.
- § 898. Order of reference and oath of referee.
- § 899. Presenting proof of claim.
- § 900. Conduct of the reference.
- § 901. Powers of the referee.
- § 902. What claims may be litigated.
- § 903. Extent of referee's inquiry.
- § 904. Right of claimant not filing notice to appear.
- § 905. Testimony to be signed and filed.
- § 906. Referee's report—Filing same.
- § 907. Exceptions to the referee's report.
- § 908. Hearing exceptions to report.
- § 909. Confirmation of referee's report.
- § 910. Opening and setting aside referee's report.
- § 911. Appeal from order for distribution.

§ 890. Distribution of surplus by surrogate.—The New York Code of Civil Procedure⁸³ provides, that “where real property, or an interest in real property, liable to be disposed of as prescribed by the statute, is sold in an action or a special proceeding, to satisfy a mortgage or other lien thereupon,

⁸³ N. Y. Code Civ. Proc. §§ 2798, 2799.

which accrued during the decedent's life-time, and letters testamentary or letters of administration upon the decedent's estate, were, within four years before the sale,⁸⁴ issued from a surrogate's court of the state, having jurisdiction to grant them; the surplus money must be paid into the surrogate's court from which the letters issued."⁸⁵ "Where money is thus paid into a surrogate's court, and a petition for the disposition of property, as prescribed by the statute, is pending before him, or is presented at any time before the distribution of the money; the decree may provide that the money be paid to the executor or administrator to be applied by him as if it was the proceeds of the decedent's real property, sold pursuant to the decree."

These sections of the Code of Civil Procedure are very similar in language to those of the former statute.⁸⁶ The former statute was held not to apply to a foreclosure by advertisement,⁸⁷ and for that reason it is thought by some that these sections of the Code do not now apply, where a foreclosure is conducted by advertisement. It is certain, however, that whether these sections do or do not apply to such proceedings, the surplus proceeds of a sale made under a decree of foreclosure, rendered more than four years after a grant of letters testamentary or of administration, are to be distributed in the

⁸⁴ The words "within four years before the sale," as used in the Code Civ. Proc. § 2798, and the words "making the sale" in Laws of 1871, chap. 834,—relating to the payment into the proper surrogate's court of surplus moneys arising on the sale of real property, if letters testamentary or of administration have been issued within a certain time,—refer to the date of the sale, and not to the commencement of the action or proceedings resulting in the sale; *White v. Poillon*, 25 Hun (N. Y.) 69. See also *Lord v.*

Anderson, 66 Misc. 593, 122 N. Y. Supp. 218.

⁸⁵ See *DiLorenzo v. Dragone*, 25 Misc. 26, 54 N. Y. Supp. 420; *Powell v. Harrison*, 88 App. Div. 228, 85 N. Y. Supp. 452. See also *Washington Life Ins. Co. v. Clark*, 79 App. Div. 160, 79 N. Y. Supp. 610.

⁸⁶ See Laws of 1867, chap. 658, as amended by Laws of 1870, chap. 170.

⁸⁷ See *Loucks v. VanAllen*, 11 Abb. (N. Y.) Pr. N. S. 427; *German Sav. Bank v. Sharer*, 25 Hun

action, though the judgment directing the sale was entered within the four years.⁸⁸

Under the Minnesota statute, on the foreclosure by advertisement of a mortgage on real estate, a junior mortgagee is an "assign" of the mortgagor, so as to be entitled, on demand, to have his mortgage paid out of the surplus, so far as it will suffice.⁸⁹

§ 891. Distribution by supreme court.—The New York Code of Civil Procedure provides, that "an attorney or other person who receives any money, arising upon a sale, made as prescribed in the title regulating foreclosures by advertisement, must, within ten days after he receives it, pay into the supreme court the surplus, exceeding the sum due and to become due upon the mortgage, and the costs and expenses of the foreclosure, in like manner and with like effect, as if the proceedings to foreclose the mortgage were taken in an action, brought in the supreme court, and triable in the county where the sale took place."⁹⁰

The Code provides further, that "a person who had, at the time of the sale, an interest in or lien upon the property sold, or a part thereof, may, at any time before an order is made, as prescribed by the statute,⁹¹ file in the office of the clerk of the county, where the sale took place, a petition stating the nature and extent of his claim, and praying for an

(N. Y.) 409; *Fliess v. Buckley*, 24 Hun (N. Y.) 514.

⁸⁸ See *White v. Poillon*, 25 Hun (N. Y.) 69. Upon the distribution in the surrogate's court, under § 2799, of surplus moneys arising on a foreclosure, where there is, under a will, a life tenancy in the lands sold, the fund must be invested and the income paid to the beneficiary until the determination of the life estate. The surrogate cannot order

the payment of a gross sum in lieu thereof. *Zahrt's Estate*, 11 Abb. (N. Y.) N. C. 225, citing *Arrow-smith v. Arrowsmith*, 8 Hun (N. Y.) 606; *In re Igglesden*, 3 Redf. (N. Y.) 375, 378. See *ante*, § 861.

⁸⁹ *Fuller v. Langum*, 37 Minn. 74, 33 N. W. 132.

⁹⁰ N. Y. Code Civ. Proc. § 2404. See *ante*, § 838.

⁹¹ See N. Y. Code Civ. Proc. § 2407

order, directing the payment to him of the surplus money, or a part thereof."⁹²

"A person filing a petition, as prescribed in the above section, may, after the expiration of twenty days from the day of sale, apply to the supreme court, at a term held within the judicial district, embracing the county where his petition is filed, for an order, pursuant to the prayer of his petition. Notice of the application must be served, in the manner prescribed by statute for the service of a paper upon an attorney in an action, upon each person, who has filed a like petition, at least eight days before the application; and also upon each person, upon whom a notice of sale was served, as shown in the affidavit of sale, or upon his executor or administrator. But, if it is shown to the court, by affidavit, that service upon any person, required to be served, cannot be so made with due diligence, notice may be given to him in any manner which the court directs."⁹³

§ 892. Action to enforce claim to surplus.—A party entitled to the surplus moneys arising from a sale on foreclosure may maintain an action therefor.⁹⁴ Thus, where an attaching creditor recovered a judgment, and the land attached was sold on a prior mortgage under a power of sale contained therein, it was held that the attaching creditor could, by an action in equity, enforce his lien against the surplus proceeds of the sale remaining in the hands of the first mortgagee.⁹⁵ And it has been held, that after the surplus has

⁹² N. Y. Code Civ. Proc. § 2405.

⁹³ N. Y. Code Civ. Proc. § 2406.

⁹⁴ See *Cope v. Wheeler*, 41 N. Y. 303, 308; *Matthews v. Duryee*, 45 Barb. (N. Y.) 69; *Bevier v. Schoonmaker*, 29 How. (N. Y.) Pr. 411; *Doyle v. West*, 60 Ohio St. 438, 54 N. E. 469. The remedy of parties having a lien on the surplus, is by motion and not by action, and except where the surplus is distrib-

uted by the surrogate's court, contract creditors are in no better position to assert any further equitable lien against moneys arising from the sale of a decedent's real estate, than they would be if he were living. *Delafield v. White*, 19 Abb. (N. Y.) N. C. 104, 109, 7 N. Y. S. R. 301.

⁹⁵ *Wiggin v. Heywood*, 118 Mass. 514.

been paid, under an order of the court, to an assignee of the mortgagor, if the widow, who neglected to appear in the foreclosure, was not notified of the reference for the distribution of the surplus, she can maintain an action against such assignee to recover her dower in the surplus.⁹⁶

Where a surplus arises upon the foreclosure of a first mortgage, the claims thereon of a second mortgagee and of judgment creditors may be determined before a referee appointed by the court in which the judgment of foreclosure was rendered, and an action cannot be maintained for that purpose.⁹⁷

A mortgagee on recovering a judgment of deficiency against the administrators of a deceased mortgagor, cannot maintain an action to have his claim declared a lien on the surplus arising on the foreclosure of a mortgage on other lands given by the same mortgagor to another mortgagee; his only remedy, aside from that against the personal estate of the decedent, is by an action against the mortgagor's heirs or devisees; if they are insolvent, the court may direct the surplus to be held and applied to the judgment.⁹⁸

The supreme court of Massachusetts, in the case of *Johnson v. Cobleigh*,⁹⁹ say that on a sale, under a power in a mortgage, of lands in which another has purchased the equity of redemption on a sale under execution against the mortgagor, the debtor is entitled to so much of the surplus as exceeds the amount he would have been obliged to pay to redeem the equity of redemption; and if no one else is interested in the fund he is entitled to recover the surplus in a legal action for money received by the creditor to his use.¹

The mortgagee or party bidding does so at his peril. If he bids more than the amount due, including expenses of sale,

⁹⁶ *Matthews v. Duryee*, 45 Barb. (N. Y.) 69.

⁹⁷ *Fliess v. Buckley*, 90 N. Y. 286.

⁹⁸ *Fliess v. Buckley*, 24 Hun (N. Y.) 514, aff'd 90 N. Y. 286.

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⁹⁹ 152 Mass. 17, 25 N. E. 73.

¹ See also *Knowles v. Sullivan*, 182 Mass. 318, 65 N. E. 389.

he must answer for the surplus,² whether the property is really worth more or less than the amount due or the sum bid.³ The test is, not the value of the property, but the amount bid.

§ 893. **Recovering surplus wrongfully paid.**—It is believed that where surplus moneys have been paid to a person not entitled thereto, under an order irregularly obtained, the court has authority by a summary proceeding to compel such person to restore the fund thus irregularly obtained without the proper order of the court.⁴

The supreme court of Minnesota, in the case of *Fuller v. Langum*,⁵ say that an officer making sale on foreclosure of a senior mortgage, and receiving the surplus knowing of the junior mortgagee's right, who immediately pays the surplus to the mortgagor, becomes liable to the junior mortgagee. And it is said that agreements and assurances made by the trustee in a trust deed that the surplus may be applied upon debts of the mortgagor when the deed expressly provides that it shall be paid to the mortgagor, are not ratified by the latter's bringing suit against the purchaser for the surplus.⁶

§ 894. **Application for surplus moneys.**—In New York on filing the referee's report of the sale, "any party to the suit, or any person who had a lien on the mortgaged premises at the time of the sale, upon filing with the clerk where the report of sale is filed a notice, stating that he is entitled to such surplus moneys or some part thereof, and the nature and extent of his claim, may have an order of reference, to ascertain and report the amount due to him, or to any other person, which is a lien upon such surplus moneys, and to ascertain the

² *Moody v. Northwestern & Pacific Hypotheek Bank*, 20 Wash. 413, 55 Pac. 568; *Babcock v. American Savings & Loan Ass'c.* 67 Minn. 151, 69 N. W. 718.

³ *Babcock v. American Savings &*

Loan Ass'c. 67 Minn. 151, 69 N. W. 718.

⁴ *Burchard v. Phillips*, 11 Paige Ch. (N. Y.) 66, 70.

⁵ 37 Minn. 74, 33 N. W. 122.

⁶ *Gair v. Tuttle*, 49 Fed. 198.

priorities of the several liens thereon; to the end that, on the coming in and confirmation of the report on such reference, such further order may be made for the distribution of such surplus moneys as may be just. The referee shall, in all cases, be selected by the court.⁷

Questions of priority between parties having claims upon the equity of redemption may be properly litigated upon the application for the surplus after it has been paid into court;⁸ but until it is ascertained that there is a surplus, such parties should not be permitted to litigate their claims as between themselves.⁹

An application for surplus moneys, made either by petition or on motion, will be fatally defective, unless it establishes a *prima facie* right to a part at least of the surplus; and it does not do this unless it shows how the parties cited claim an interest in the mortgaged lands.¹⁰

In those cases where the judgment and decree of foreclosure of a mortgage and ordering the sale of the mortgaged property, omits a provision directing what disposition shall be made of any surplus remaining after the costs and liens are paid from the proceeds of the sale, will not work a reversal of the judgment, but the court may, upon application after judgment, direct the payment of the surplus to any party entitled thereto.¹¹ Where a junior lien holder has laid specific claim to any rents that a receiver appointed in foreclosure proceedings might collect, before the lands are leased pending the proceedings, the court should direct the surplus of the rent remaining after satisfying the mortgage lien to be held by the receiver subject to the further order of the court, until after the determination of the suit of such lien-holder to es-

⁷ N. Y. Supreme Court Rule 64.

⁸ *Schenck v. Conover*, 13 N. J. Eq. (2 Beas.) 31, 78 Am. Dec. 95.

⁹ *Union Ins. Co. v. VanRensselaer*, 4 Paige Ch. (N. Y.) 85.

¹⁰ *Allen v. Wayne Circuit Judges*,

57 Mich. 198. See *Broeker v. Morris, as sheriff, etc.* 42 Ind. App. 417, 85 N. E. 982.

¹¹ *Brier v. Brinkman*, 44 Kan. 570, 24 Pac. 1108.

tablish his lien.¹² In case of the death of the mortgagor, and no administration upon his estate for seventeen months after such death, on the sale of the mortgaged premises his heirs will be given the surplus.¹³

The Missouri court of appeals, in the case of *Perkins v. Heiser*,¹⁴ say that a party purchasing property under a deed of trust has no right to have any portion of the surplus arising from that sale applied to the payment of a prior mechanics' lien judgment.

§ 895. Who entitled to notice—How served.—“The owner of the equity of redemption, and every party who appeared in the cause, or who shall have filed a notice of claim with the clerk, previous to the entry of the order of reference, shall be entitled to service of a notice of the application for the reference, and to attend on such reference, and to the usual notices of subsequent proceedings relative to such surplus.¹⁵ But if such claimant or such owner has not appeared, or made his claim by an attorney of this court, the notice may be served by putting the same into the post-office, directed to the claimant at his place of residence, as stated in the notice of his claim, and upon the owner in such manner as the court may direct.”¹⁶

§ 896. Certificate and proof of depositing surplus.—On an application for the distribution of the surplus, the

¹² *Weiss v. Neel* (Ark.) 14 S. W. 1097.

¹³ *Snow v. Warwick Sav. Inst.* 17 R. I. 66, 20 Atl. 94.

¹⁴ 34 Mo. App. 465.

¹⁵ *Allen v. Wayne Circuit Judges*, 57 Mich. 198, 23 N. W. 728. See *Van Voast v. Cushing*, 32 App. Div. 116, 52 N. Y. Supp. 934. See also *DeLorenzo v. Dragone*, 25 Misc. 26, 54 N. Y. Supp. 420.

¹⁶ N. Y. Supreme Court Rule 64.

See *Franklin v. VanCott*, 11 Paige Ch. N. Y. 129; *Hulbert v. McKay*, 8 Paige Ch. (N. Y.) 652; *In re Solomon*, 4 Redf. (N. Y.) 509; *Allen v. Wayne Circuit Judges*, 57 Mich. 198; *Smith v. Smith*, 13 Mich. 258. For service of notice in application for distribution of surplus money in foreclosure by advertisement see N. Y. Code Civ. Proc. § 2406.

moving party should produce to the referee the certificate of the county treasurer or of the chamberlain of New York, if the suit is pending there, or of the person with whom the surplus is required to be deposited, either by law or by the decree of the court, showing the amount thereof;¹⁷ and showing also, that no notice of claim to such surplus was annexed to the report of sale, and that no claim to the same was filed previous to the order of reference; or, if claims have been filed, the certificate should set forth the names of the claimants, and of their attorneys, if any, and their places of residence.¹⁸

The party moving for the reference should also show by affidavit, what unsatisfied liens appear by the official searches used in the progress of the action, where there are any, and what other unsatisfied liens are known to exist.¹⁹

§ 897. Appointment of referee.—Upon the filing of a claim to the surplus moneys by a party to the suit, or by any person who claims an interest in such surplus, the court may appoint a referee to ascertain and determine the rights of the several claimants.²⁰ Such a reference is not a collateral action;²¹ it is a special proceeding,²² and decides direct issues necessary to be determined before the court can finally and completely distribute the surplus arising from the the sale of the mortgaged premises.²³

Where there are surplus moneys in the hands of a mortgagee, arising upon the foreclosure of a mortgage by adver-

¹⁷ N. Y. Supreme Court Rules 61, 64.

¹⁸ *Hulbert v. McKay*, 8 Paige Ch. (N. Y.) 651. See *Franklin v. VanCott*, 11 Paige Ch. (N. Y.) 129.

¹⁹ N. Y. Supreme Court Rule 64.

²⁰ According to the practice in some courts such a reference is allowed as a matter of course; but in others, it is allowed only on application upon notice. *Ward v.*

Montclair R. R. Co. 26 N. J. Eq. (11 C. E. Gr.) 260.

²¹ *Mutual Life Ins. Co. v. Bowen*, 47 Barb. (N. Y.) 618.

²² *Mutual Life Ins. Co. v. Anthony*, 23 N. Y. Week. Dig. 427; *Velleman v. Rohrig*, 193 N. Y. 439, 86 N. E. 476.

²³ *Mutual Life Ins. Co. v. Bowen*, 47 Barb. (N. Y.) 618

tisement, and two separate actions have been brought by judgment creditors of the mortgagor to have such surplus applied towards the payment of their respective judgments, and a reference has been ordered to determine to whom such surplus shall be paid, and neither party appeals from such order, or applies for an order requiring the referee to report the evidence, the proceeding must be treated in all respects as a reference made in pursuance of the supreme court rule to settle claims to surplus moneys in foreclosure cases. By neglecting to appeal from such order of reference, both parties tacitly consent to that method of determining their respective rights.²⁴

§ 898. Order of reference and oath of referee.—The New York Code of Civil Procedure²⁵ provides, that “upon the presentation of the petition, with due proof of notice for application, the court must make an order, referring it to a suitable person, to ascertain and report the amount due to the petitioner, and to each other person, which is a lien upon the surplus money; and the priorities of the several liens thereupon. Upon the coming in and confirmation of the referee’s report, the court must make such an order, for the distribution of the surplus money, as justice requires.”

The supreme court of Michigan, in the case of *Allen v. Wayne Circuit Judges*,²⁶ say that where a surplus arises on a mortgage foreclosure, to which a claim is made, the petition for the reference required in such case is fatally defective if it does not show how the parties cited are related to the mortgaged lands.

The referee in a proceeding for the distribution of surplus moneys, before proceeding to examine the certificates or to receive evidence, should be sworn faithfully and fairly to try the issues referred to him, and to make a just and true report,

²⁴ *Kirby v. Fitzgerald*, 31 N. Y. 417.

²⁵ § 2407.

²⁶ 57 Mich. 198, 23 N. W. 728.

according to the best of his understanding;²⁷ the neglect of the referee to take such oath, is not a fatal error, however, and the omission may be subsequently supplied.²⁸ But where all the parties are of age and represented at the hearing either in person or by attorney, they may expressly waive the referee's oath, either orally or in writing.²⁹

§ 899. Presenting proof of claim.—In all proceedings on a reference to ascertain claims and liens upon surplus moneys in a foreclosure action, the general rules of evidence governing courts on the trial of an action apply, and they cannot be changed by an order of the court appointing the referee.³⁰

The parties prosecuting a reference for the distribution of surplus moneys, must establish their respective claims and the amounts thereof before the referee, in the same manner as is required of creditors coming in under a decree in the settlement of the estate of an insolvent debtor; the referee should examine the parties upon oath concerning their respective claims.³¹

In a case where the claimants offered in evidence a transcript of a judgment recovered by them, in an action commenced against a person of the same name as the owner of the equity, it was held that there was a presumption that the owner of the equity and the judgment debtor were the same person.³²

Under the former chancery rules the correct practice, where a person had an equitable lien upon the surplus moneys,

²⁷ N. Y. Code Civ. Proc. § 1016.

²⁸ N. Y. Code Civ. Proc. § 721, subdivision 12. See *Mutual Life Ins. Co. v. Anthony*, 23 N. Y. Week. Dig. 427.

²⁹ N. Y. Code Civ. Proc. § 1016.

³⁰ *Mutual L. Ins. Co. v. Anthony*, 50 Hun (N. Y.) 101, 19 N. Y. S. R. 38.

³¹ *Hulbert v. McKay*, 8 Paige Ch. (N. Y.) 651. See *DeRuyter v. St. Peter's Church*, 2 Barb. Ch. (N. Y.) 555. A referee appointed to take and report testimony, is not bound to take irrelevant testimony. *In re Silvernail*, 45 Hun (N. Y.) 575.

³² *Bowery Sav. Bank v. Keenan*, 14 New York Week. Digest, 143.

was to deliver a notice of his claim to the master who made the sale, or to file it with the clerk in whose office the surplus moneys were deposited by the master; or, in case an order of reference was entered upon the application of some other claimant before he became aware of his rights, to appear before the master, upon the reference, and to present and establish his claim there. If he neglected to do this, without a sufficient excuse, the court would not hear his claim to such surplus moneys upon a petition.³³

But now any party to the suit, or any person not a party to the suit, who has a lien on the mortgaged premises at the time of the sale, is entitled to appear before the referee and to prove his claim.³⁴ A plaintiff who holds mortgages or other liens which are junior to the mortgage foreclosed, is entitled to appear and prove such liens the same as any other party to the action or any other holder of a lien.³⁵

§ 900. Conduct of the reference.—The New York Code of Civil Procedure and the rules of the supreme court do not prescribe the general powers of the referee on a reference for the distribution of surplus moneys.³⁶ The object of such a proceeding is to ascertain the amount due to each of the persons having liens upon the surplus and the priorities of such liens, in order that on the coming in of the report, the court may make an order for the distribution of such fund.³⁷ The proceedings on such a reference are similar to those taken earlier in the foreclosure to compute the amount due on the mortgage.

³³ *DeRuyter v. St. Peter's Church*, 2 Barb. Ch. (N. Y.) 555.

³⁴ *Field v. Hawxhurst*, 9 How. (N. Y.) Pr. 75.

³⁵ *Mutual Life Ins. Co. of N. Y. v. Truchtnicht*, 3 Abb. (N. Y.) N. C. 135. See *White v. Shirk*, 20 Ind. App. 589, 51 N. E. 126. See *ante*, § 843.

³⁶ N. Y. Code Civ. Proc. § 1018, applies only to the trial of issues joined in an action.

³⁷ See Laws of 1868, chap. 804, § 3. (Repealed by Code Civ. Proc. § 4.)

The referee appointed in proceedings to distribute the surplus, is a substitute for the former master in chancery under the old chancery practice, and his general powers and duties, not being prescribed by statute or by the rules of the supreme court are the same as those possessed by a master in chancery, and that part of the former practice, which is not inconsistent with the Code, is thought to be still in force in its application to such references.³⁸

§ 901. Powers of the referee.—The proceedings on a reference to ascertain the priority of liens on surplus moneys are a part of the original action; the reference is not a collateral matter, and any issue may be litigated in it, which must be determined by the court before the whole of the fund can be fully and completely distributed.³⁹ Thus, it has been held that the referee has authority to inquire into the validity of conveyances or liens; and such conveyances as well as liens may be attacked as fraudulent;⁴⁰ he also has power to examine into questions of usury;⁴¹ but he cannot examine into an allegation of usury as against a prior judgment.⁴²

A referee is authorized to make an equitable adjustment of all claims to the surplus moneys. He has full power to hear all the evidence that may be offered affecting the matters in controversy. The reference is provided to afford an opportunity to the parties interested to litigate and dispose of their claims and liens upon the surplus. He may receive

³⁸ *Ketchum v. Clark*, 22 Barb. (N. Y.) 319; *Palmer v. Palmer*, 13 How. (N. Y.) Pr. 363; *Van Zandt v. Cobb*, 10 How. (N. Y.) Pr. 348; *Graves v. Blanchard*, 4 How. (N. Y.) Pr. 303, 1 VanSant. Eq. Pr. 21, 22, 523.

For costs in surplus proceedings see *post*, § 1017.

³⁹ *Mutual Life Ins. Co. v. Bowen*, 47 Barb. (N. Y.) 618.

⁴⁰ *Fliess v. Buckley*, 90 N. Y. 288; *Bergen v. Carman*, 79 N. Y. 146, citing *Halsted v. Halsted*, 55 N. Y. 442; *Schafer v. Reilly*, 50 N. Y. 61; *McRoberts v. Pooley*, 12 N. Y. Civ. Proc. Rep. 139.

⁴¹ *Mutual Life Ins. Co. v. Bowen*, 47 Barb. (N. Y.) 618.

⁴² *Slosson v. Duff*, 1 Barb. (N. Y.) 432.

proof that an asserted lien is for any cause without foundation, or that it has been overstated in amount or satisfied and discharged, or that the claimant has placed himself in a position where the law will not permit him to participate in the distribution of the surplus. In fact, the authority which the referee is entitled to exercise in the hearing and disposition of claims, is as extensive as the claims themselves, or as the legal and equitable objections that may be made to their allowance.⁴³

The court held in the case of *Tator v. Adams*,⁴⁴ that although there had previously been some doubt as to the powers of referees in proceedings to distribute surplus moneys, the decision of *Bergen v. Snedeker*⁴⁵ has settled the matter. It was held there, that a question of fraud may be investigated before the referee; and it follows, by analogy, than any question may be examined tending to show the equities of the claimants.⁴⁶

The power of a referee, to determine the validity of a claim in proceedings to distribute surplus moneys, is not confined to so much thereof only as will exhaust the surplus, but his decision sustaining the claim and overruling defenses thereto will be binding and conclusive upon the parties in all other matters.⁴⁷ Whenever the facts in a case would warrant an

⁴³ *Kingsland v. Chetwood*, 39 Hun (N. Y.) 602, 607, which holds that this measure of authority seems to be within the decision of *Bergen v. Carman*, 79 N. Y. 146 and *Fliess v. Buckley*, 90 N. Y. 286, which very much enlarged the rule, as it was supposed to exist when the case of the *Union Dime Savings Institution v. Osley*, 4 Hun (N. Y.) 657, was decided. See *Gutwillig v. Weiderman*, 26 App. Div. 26, 49 N. Y. Supp. 984.

⁴⁴ 20 Hun (N. Y.) 131.

⁴⁵ 8 Abb. (N. Y.) N. C. 50, 57, 21 Alb. L. J. 54.

⁴⁶ *Wilcox v. Drought*, 36 Misc. 351, 73 N. Y. Supp. 587. See *Schafer v. Reilly*, 50 N. Y. 61; *Mutual Life Ins. Co. v. Bowen*, 47 Barb. (N. Y.) 618.

⁴⁷ *Bergen v. Carman*, 79 N. Y. 146; *Halsted v. Halsted*, 55 N. Y. 442; *Husted v. Dakin*, 17 Abb. (N. Y.) Pr. 137; *King v. West*, 10 How. (N. Y.) Pr. 333; *Sleight v. Read*, 9 How. (N. Y.) Pr. 278; *Rogers v. Ivers*, 23 Hun (N. Y.) 424; *Tator v. Adams*, 20 Hun (N. Y.) 131; *Union Dime Sav. Inst. v. Osley*, 4 Hun (N. Y.) 657; *Mutual Life Ins. Co. v. Salem*, 5 T. & C. (N. Y.)

action in equity to declare a claim to be a lien on a fund, a referee in surplus money proceedings may hear and determine an application to establish such lien, and if he is of the opinion that it should be granted, he may report directly in favor thereof.⁴⁸

§ 902. What claims may be litigated.—The only claims that can be considered in a proceeding before a referee for the distribution of surplus moneys, are such liens as would subject the estate to be sold without the further intervention of the court; claims which have not been perfected into liens cannot be considered, however equitable they may be.⁴⁹ It would seem, however, that the inchoate rights of mechanics and material-men, where liens are given to them by statute, are claims of such a nature that, although not established by judgment, they are entitled to be considered by the referee and to share in the distribution of the surplus moneys.⁵⁰

On a reference to ascertain to whom surplus moneys arising on a foreclosure belong, the referee is authorized to state the account of a tenant in common who has been in possession of the premises and collected the rents, and to charge his share of the surplus with the excess so collected over the part to which he was entitled;⁵¹ and it was held in the case of *Atlantic Savings Bank v. Hiler*,⁵² that where an attorney for a judgment creditor claims a lien upon the judgment for his fees in procuring it, the referee may protect such lien by order-

246; *Atlantic Sav. Bank v. Hetterick*, 5 T. & C. (N. Y.) 239; *Bergen v. Snedeker*, 21 Alb. L. J. 54, 8 Abb. (N. Y.) N. C. 50; *McRoberts v. Pooley*, 12 N. Y. Civ. Proc. Rep. 139.

⁴⁸ *Crombie v. Rosentock*, 19 Abb. (N. Y.) N. C. 312. See *Fliess v. Buckley*, 90 N. Y. 286; *Bergen v. Carman*, 79 N. Y. 146; *Halsted v. Halsted*, 55 N. Y. 442; *Kingsland v. Chetwood*, 39 Hun (N. Y.) 602;

Tator v. Adams, 20 Hun (N. Y.) 131; *Bowen v. Kaughran*, 1 N. Y. State Rep. 121.

⁴⁹ *Husted v. Dakin*, 17 Abb. (N. Y.) Pr. 137; *Mutual Life Ins. Co. v. Bowen*, 47 Barb. (N. Y.) 618; *King v. West*, 10 How. (N. Y.) Pr. 333.

⁵⁰ *Livingston v. Mildrum*, 19 N. Y. 440.

⁵¹ *Kingsland v. Chetwood*, 39 Hun (N. Y.) 602.

⁵² 3 Hun (N. Y.) 209.

ing a portion of the amount due on the judgment to be paid to such attorney.

So the referee may determine whether or not a clause reserving a life estate to the mortgagor, appearing in a mortgage produced by a claimant, was inserted by mistake; and if he finds that it was so inserted, he may give the mortgage priority as against subsequent judgment creditors who ask to have the value of such life estate first set apart from the surplus and applied to the payment of their debts.⁵³

Where it appears that the intention in executing certain written instruments was to assign the rights of the parties in the surplus moneys, though express words of assignment were not used, such instruments will be held to be equitable assignments, and the referee may report directly in favor of the equitable assignee.⁵⁴

A judgment lien upon surplus moneys cannot be attacked on such a reference by a junior claimant, because of a mere irregularity not affecting the jurisdiction of the court in which it was rendered.⁵⁵ Subsequent incumbrancers of mortgaged premises have no claim upon and are not entitled to share in the surplus moneys arising upon a statutory foreclosure of which they had no notice, because their liens are not affected by the proceedings and are not transferred from the land to the surplus.⁵⁶

In a proceeding for the distribution of surplus moneys, arising from the sale of mortgaged premises under a decree for the foreclosure of a first mortgage, where the holders of a fourth mortgage set up before the referee usury in a third mortgage, it was held that the third mortgage, being affected or tainted with usury, was void as to the holders of the fourth mortgage, and was no lien, either at law or in equity, on the surplus moneys.⁵⁷

⁵³ *Tator v. Adams*, 20 Hun (N. Y.) 131.

⁵⁴ *Bowen v. Kaughran*, 1 N. Y. State Rep. 121.

⁵⁵ *White v. Bogart*, 73 N. Y. 256.

⁵⁶ *Root v. Wheeler*, 12 Abb. (N. Y.) Pr. 294; *Winslow v. McCall*, 32 Barb. (N. Y.) 241.

⁵⁷ *Mutual Life Ins. Co. of N. Y. v. Bowen*, 47 Barb. (N. Y.) 618.

The supreme court of New York, in the case of *Wolfers v. Duffield*,⁵⁸ say that a stay of proceedings for the distribution of surplus money on mortgage foreclosure will not be ordered until the trial of an action brought sixteen years before to set aside a deed of the premises as fraudulent, since in the surplus proceedings all questions as to the fraudulent character of the deed can be tested; and if it is an action to set aside the deed as fraudulent, no trial by jury can be had as of right; and that if it is to recover damages for fraud and deceit, recovery in the action will not establish a lien upon the surplus moneys.

§ 903. *Extent of referee's inquiry.*—It has been said that where an order of reference directs the referee to inquire and report, not only as to the amount due to the party obtaining such order, but also as to the liens of any other persons upon the surplus moneys, the referee therefor should ascertain the whole amount of such surplus by the certificate of the treasurer of the county or of the city chamberlain, as the case may be, and if the lien of the party obtaining the reference and entitled to priority is not large enough to exhaust the whole surplus, it is then the duty of the referee to go further and to ascertain who is entitled to the residue of such surplus; so that, upon the coming in of a report, an order may be made which will dispose of the whole surplus fund. *Prima facie* the owner of the equity of redemption is entitled to the surplus, and if no one attends before the referee and produces evidence of a better right, and there is no evidence before him that the person entitled thereto *prima facie* has parted with his right, it is the duty of the referee to report that the residue of such surplus belongs to the owner of the equity of redemption.⁵⁹

§ 904. *Right of claimant not filing notice to appear.*—An incumbrancer or lienor who has neglected to file a notice

⁵⁸ 25 N. Y. Supp. 374, 55 N. Y. S. R. 485.

⁵⁹ *Franklin v. VanCott*, 11 Paige Ch. (N. Y.) 129.

of his claim upon the surplus moneys, may appear before the referee pending the reference as to such surplus, and file his claim in proper manner; he will then be entitled to be heard upon the reference as to the validity of his claim, upon such equitable terms as to costs as the referee may direct.⁶⁰

Where an order of reference has been entered upon the application of another claimant, before the petitioner became aware of his rights, he will, nevertheless, be authorized to appear on the reference and to present and establish his claim to the surplus.⁶¹ But he cannot, pending such reference, maintain an independent proceeding by a new petition or motion.⁶²

§ 905. Testimony to be signed and filed.—Under the New York practice, the testimony upon a reference in proceedings for the distribution of the surplus, must be signed by the witnesses and filed with the report of the referee,⁶³ a note of the time of the filing must be entered by the clerk in a proper book under the title of the foreclosure.⁶⁴

This rule is imperative, unless its provisions are waived by some act of the parties; the mere omission of the parties to request that the signatures of the witnesses be affixed to their testimony, will not amount to a waiver.⁶⁵

Where a witness fails to sign his testimony, the remedy for the irregularity is by motion for the purpose of securing

⁶⁰ *Hulbert v. McKay*, 8 Paige Ch. (N. Y.) 651.

⁶¹ See *DeRuyter v. St. Peter's Church*, 2 Barb. Ch. (N. Y.) 555; *Hulbert v. McKay*, 8 Paige Ch. (N. Y.) 651.

⁶² *DeRuyter v. St. Peter's Church*, 2 Barb. Ch. (N. Y.) 555.

⁶³ *Pope v. Perault*, 22 Hun (N. Y.) 468. And it is said that although a court stenographer is not obliged to part with his notes until

his fees are paid, yet if he delivers them to the referee to be examined by him or used as the basis of his report, but not to be filed until his fees are paid, the referee must, nevertheless, file them with his report, even though the stenographer's fees remain unpaid. *Pope v. Perault*, 22 Hun (N. Y.) 468.

⁶⁴ N. Y. Supreme Court Rule 30.

⁶⁵ *Bowne v. Leveridge*, 2 Month. Law Bull. 88.

its correction and not by filing exceptions to the report of the referee.⁶⁶

§ 906. **Referee's report—Filing same.**—Upon a reference to ascertain who are entitled to the surplus moneys brought into court under a foreclosure, the referee must ascertain and report the facts as directed in the order of his appointment; such report should show on its face that every party entitled to notice to attend upon the reference, was duly summoned to appear; it should also state what parties appeared on the reference.⁶⁷

After the report of the reference has been prepared it should be filed, and an order for the confirmation thereof should be entered with the order for the distribution of the surplus. The latter will be granted as a matter of course, unless exceptions to the report have been filed.⁶⁸

§ 907. **Exceptions to the referee's report.**—Any person interested in the distribution of the surplus moneys may file exceptions to the report of the referee, if he considers himself aggrieved thereby; if two or more persons wish to file the same objections to the report, they may do so either by joining in the same exceptions or by stating their exceptions separately. Parties who have appeared on the reference, are entitled to notice of the filing of the referee's report.⁶⁹ At any time after the report is filed either party may bring on the action or proceeding at Special Term on notice to the parties interested therein.⁷⁰

Where no exceptions are taken to the report it must be confirmed by the entry of the usual order; proof by certificate

⁶⁶ *National State Bank v. Hibbard*, 45 How. (N. Y.) Pr. 281, 287. See *Greene v. Bishop*, 1 Cliff. C. C. 186.

⁶⁷ *Franklin v. VanCott*, 11 Paige Ch. (N. Y.) 129; *Hulbert v. McKay*, 8 Paige Ch. (N. Y.) 651. See *Cram v. Mitchell*, 3 N. Y. Leg. Obs.

163; *Burchard v. Phillips*, 3 N. Y. Leg. Obs. 35.

⁶⁸ See *Franklin v. VanCott*, 11 Paige Ch. (N. Y.) 129; *Ex parte Allen*, 2 N. J. Eq. (1 H. W. Gr.) 388.

⁶⁹ N. Y. Supreme Court Rule 64

⁷⁰ N. Y. Supreme Court Rule 30

or affidavit that such report has become absolute must be produced, before an order to pay the amounts reported will be granted.⁷¹

§ 908. **Hearing exceptions to report.**—Where exceptions have been filed to the referee's report and a motion for the final hearing is brought on, the party excepting must furnish the court with copies of the report and of the exceptions and proofs of claims.⁷² The rules of the New York supreme court⁷³ require that the testimony taken by the referee shall be signed and filed.⁷⁴ But in those states where the testimony is not required to be annexed to and returned with the report, if the party excepting thereto desires to review some question upon the evidence taken before the referee, or if any party desires to use such evidence on the argument of the exceptions, a duly certified copy thereof must be obtained from the referee.⁷⁵

At such hearing the court will not only look to the proofs of claims, but it will also receive any other evidence in its discretion, such as stipulations, and the admissions of the parties presented on the hearing.⁷⁶ But affidavits taken subsequently to the report cannot be read at such hearing, and no evidence can be produced which was not introduced before the referee.⁷⁷

If the court allows the exceptions or any of them, it may modify or set aside the report, or send it back to the referee with proper directions to proceed thereon *de novo*, or to correct specified defects therein, as by ascertaining some fact which may be necessary to enable the court to reach a proper

⁷¹ *Franklin v. VanCott*, 11 Paige Ch. (N. Y.) 129.

⁷² 1 VanSant Eq. Pr. 571.

⁷³ N. Y. Supreme Court Rule 30.

⁷⁴ See *ante*, § 905.

⁷⁵ *In re Merritt*, 1 VanSant. Eq. Pr. 566n, 1 Hoff. Ch. Pr. 545, 1 Barb. Ch. Pr. 549.

⁷⁶ *Gregory v. Campbell*, 16 How. (N. Y.) Pr. 417.

⁷⁷ *Hedges v. Cardonnel*, 2 Atk. 408. See *Jenkins v. Eldredge*, 3 Story C. C. 299, 306.

decision. In any event, a new order of reference should be made, reserving the distribution of the surplus and the costs of the proceeding until the coming in of the new report.

§ 909. Confirmation of referee's report.—The court has power in its discretion to confirm, or set aside, or refer back the report of a referee appointed to ascertain the rights of claimants to surplus moneys on foreclosure, and is not restricted in the exercise of this power by the rules governing a motion for a new trial.⁷⁸ It has been held that where an order is entered directing that a master's report of a foreclosure sale be confirmed unless objections are filed, on the filing of such objections for the sole purpose of deciding who is entitled to the surplus, an order disposing of such surplus is equivalent to a confirmation of the sale, as against the party objecting.⁷⁹

It is said in the case of *Cutting v. Tavors, Orlando and Atlantic Railroad Company*,⁸⁰ that a decree of distribution of the proceeds of a railroad mortgage is erroneous in rejecting a credit to the purchaser which was allowed by the decree of confirmation settling his rights and obligations.

§ 910. Opening and setting aside referee's report.—After a sale under a foreclosure, and before the distribution of the surplus moneys, a party who has a judgment lien on the premises at the time of the sale may have the proceedings opened, so that he may be heard upon his right to share in the surplus;⁸¹ because, while the moneys remain in the court undistributed, it may at any time vacate an order confirming the report and refer the matter back to the referee for a fur-

⁷⁸ *Mutual Life Ins. Co. v. Anthony*, 23 N. Y. Week. Dig. 427; *Dold v. Haggerty*, 24 Hun (N. Y.) 383, 11 Rep. 746; *Mutual Life Ins. Co. v. Salem*, 3 Hun (N. Y.) 117, 5 T. & C. (N. Y.) 246. See also *Van Mortg.* Vol. II.—81.

Voast v. Cushing, 32 App. Div. 116, 52 N. Y. Supp. 934.

⁷⁹ *Lambert v. Livingston*, 131 Ill. 161, 23 N. E. 352.

⁸⁰ 61 Fed. 150.

⁸¹ *Citizens' Savings Bank v. Van*

ther report.⁸² Thus, it has been held that where a general creditor, who had no notice of the proceedings to distribute the surplus until after the entry of the order confirming the report of the referee, applies to be made a party to the proceeding, his application should be granted.⁸³

But where the report of the referee directs a distribution of the surplus as it should be legally and equitably made, his report will not be set aside or disregarded, or the order confirming it vacated, simply on account of an irregularity in receiving or considering claims which were not filed with the county clerk.⁸⁴

§ 911. Appeal from order for distribution.—Where a party finds himself aggrieved by the decision of the court on a motion for the confirmation of a referee's report, his remedy is by appeal.⁸⁵ The court of appeals has jurisdiction to decide an appeal from an order for the distribution of surplus moneys, because such an order, even if entitled in the action, is not made therein, but in a special proceeding commenced after the action is ended by a final judgment which effects every object that the action was brought to accomplish.⁸⁶

Tassel, N. Y. Daily Reg. May 28, 5 Month. Law Bull. 50.

⁸² *Mutual Life Ins. Co. v. Salem*, 3 Hun (N. Y.) 117, 5 T. & C. (N. Y.) 246.

⁸³ *German Savings Bank v. Sharer*, 25 Hun (N. Y.) 409.

⁸⁴ *Kingsland v. Chetwood*, 39 Hun (N. Y.) 602.

⁸⁵ *McRoberts v. Pooley*, 12 N. Y. Civ. Proc. Rep. 139.

⁸⁶ *Bushwick Savings Bank v. Traum*, 158 N. Y. 668, 52 N. E. 1123, affirming 26 App. Div. 532, 50 N. Y. Supp. 542; *Velleman v. Rohrig*, 193 N. Y. 439, 86 N. E. 476.

CHAPTER XXXIV.

STATUTORY FORECLOSURE OR FORECLOSURE BY ADVERTISEMENT.

POWER OF SALE—NOTICE OF SALE—PUBLISHING, POSTING, SERVING—CONTENTS
OF NOTICE—CONDUCT OF SALE—SETTING ASIDE—ENJOINING—EFFECT OF
SALE—AFFIDAVITS OF PROCEEDINGS—RECORDING SAME—OPERATE AS DEED
TO PASS TITLE.

- § 912. General nature.
- § 913. Stipulation for foreclosure by advertisement.
- § 914. What mortgages may be foreclosed by advertisement.
- § 915. Foreclosure by advertisement, where part of debt otherwise collected.
- § 916. Who may foreclose by advertisement.
- § 917. Notice of sale—Publication.
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- § 921. Personal service of notice—Who entitled to.
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- § 932. Stating amount due in notice.
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- § 942. Mortgagee may become purchaser.
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- § 948. Effect of sale by advertisement.
- § 949. Sale firm and binding on all parties.
- § 950. Effect of sale on omitted parties—Rights of tenants.
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- § 952. Defective foreclosure.
- § 953. Affidavits of the proceedings.
- § 954. Sufficiency of affidavits.
- § 955. Contents of affidavits.
- § 956. Amending affidavits.
- § 957. Recording affidavits.
- § 958. Necessity of recording affidavits.
- § 959. Contradicting affidavits.
- § 960. Effect of affidavits.
- § 961. Necessity for deed.
- § 962. Obtaining possession by purchaser—Summary proceedings.

§ 912. **General nature.**—Statutory foreclosure, or foreclosure by advertisement, is exclusively a creation of legislative enactment in the various states where it is allowed;⁸⁷ every requirement of the statute must be strictly complied with, as failure to comply with any of its material directions will render the foreclosure irregular and void.⁸⁸

⁸⁷ As to the provisions in New York, see N. Y. Code Civ. Proc. § 2387, *et seq.*

⁸⁸ *Cole v. Moffitt*, 20 Barb. (N. Y.) 18; *St. John v. Bumpstead*, 17 Barb. (N. Y.) 100; *Stanton v. Kline*, 16 Barb. (N. Y.) 9; *Cohoes v. Goss*, 13 Barb. (N. Y.) 137; *King v. Duntz*, 11 Barb. (N. Y.) 191; *VanSlyke v. Sheldon*, 9 Barb. (N. Y.) 278; *Low v. Purdy*, 2 Lans. (N. Y.) 422. See *Lawrence v. Farmers' Loan & Trust Co.* 13 N. Y. 200, 64 Am. Dec. 512; *Powell v. Tuttle*, 3 N. Y. 396, 401; *People v. Board of Police*, 6 Abb. (N. Y.) Pr.

162, 164; *Doughty v. Hope*, 3 Den. (N. Y.) 594, 1 N. Y. 79; *Striker v. Kelly*, 2 Den. (N. Y.) 323, 330; *Sherwood v. Reade*, 6 Hill (N. Y.) 431; *Sharp v. Johnson*, 4 Hill (N. Y.) 92, 99, 40 Am. Dec. 259; *Sharp v. Spear*, 4 Hill (N. Y.) 76, 84; *Bloom v. Burdick*, 1 Hill (N. Y.) 141, 37 Am. Dec. 299; *Thatcher v. Powell*, 19 U. S. (6 Wheat.) 119, 5 L. ed. 221; *Lockett v. Hill*, 1 Wood C. C. 552.

For a history of the statute for foreclosure by advertisement in New York, see *Mowry v. Sanborn*, 68 N. Y. 153, 72 N. Y. 534, 65 N. Y.

A power contained in the mortgage seeking to confer the right of foreclosure is void.⁸⁹ Where the statute confers the right to foreclosure by advertisement, no notice of intention to foreclose a mortgage containing a power of sale is necessary, unless there was an express stipulation therefor.⁹⁰ And in those cases where a mortgage expressly provides that the mortgagee may sell at private sale, and does not provide for any notice to be given, a sale without notice after the debt is due is valid.⁹¹ Where a sale under a power in a mortgage is regular, it cuts off the equity of redemption and reduces it to a mere statutory right, although no conveyance is executed to the purchaser.⁹² And where, at such a sale, there is no writing signed to take the contract out of the Statute of Frauds, only the mortgagee and the purchaser can take advantage of the omission.⁹³

The supreme court of Rhode Island, in the case of Bull's Petition,⁹⁴ say that a power reserved to a grantor in a mortgage, to release any restrictions in his deeds against erecting any edifice for obstruction of light near the buildings, the mortgage also containing a power of sale authorizing the mortgagee to sell the premises absolutely and in fee simple, is extinguished by a sale for breach of condition.

In the case of *Riley v. McCord*,⁹⁵ the court say: "It has long been the opinion that, notwithstanding the mode prescribed by the statute, a party may forego the statutory remedy, and pursue his rights in a court of chancery by a bill in equity." Consequently it has been said that "when a proceeding to foreclose a mortgage has been had, in order to de-

581, 62 Barb. (N. Y.) 223, 11 Hun (N. Y.) 545, 7 Hun (N. Y.) 380.

⁸⁹ Thus, in Nebraska, a sale under a power of sale in a mortgage is void; the mortgagee's remedy is limited to proceedings in court. *Wheeler v. Sexton*, 34 Fed. 154.

⁹⁰ *Carver v. Brady*, 104 N. C. 219, 10 S. E. 565.

⁹¹ *Rose v. Page*, 82 Mich. 105, 46 N. W. 227.

⁹² *Newburn v. Bass*, 82 Ala. 622, 2 So. 520.

⁹³ *Newburn v. Bass*, 82 Ala. 622, 2 So. 520.

⁹⁴ 15 R. I. 534, 10 Atl. 484.

⁹⁵ 24 Mo. 268.

termine whether it was under the statute or according to the course in chancery, we must have recourse to the substance of the thing, and not to the rhetorical flourishes with which it may be accompanied.”⁹⁶

The terms of a statute requiring, in case of a bond and mortgage given for the same debt, that the mortgage shall be first foreclosed,⁹⁷ are not waived by giving with the bond a warrant to confess judgment; and a judgment entered upon such bond before the foreclosure of the accompanying mortgage is irregular.⁹⁸ And it is held that a statute providing that a mortgage shall be foreclosed before the bond, applies whether the mortgagee be complainant or defendant.⁹⁹

§ 913. Stipulation for foreclosure by advertisement.—

While it is true that the parties to a mortgage may contract for a private sale of the premises without notice,¹ in the absence of a positive statutory prohibition, yet such contracts are contrary to the general policy of statutes providing for foreclosure by advertisement; to render such sales valid and

⁹⁶ *Riley v. McCord*, 24 Mo. 268.

⁹⁷ As N. J. Supp. Rev. Stat. 490, P. L. 1881, p. 184.

⁹⁸ *Hellyer v. Baldwin*, 53 N. J. L. (24 Vr.) 141, 20 Atl. 1080,

⁹⁹ *Hinkle v. Champion*, 42 N. J. Eq. (15 Stew.) 610, 8 Atl. 656.

¹ *Elliott v. Wood*, 45 N. Y. 71, 78. See *Lawrence v. Farmers' Loan & Trust Co.* 13 N. Y. 200; *Montague v. Dawes*, 94 Mass. (12 Allen), 397. The validity of such a power was at first doubted, although it is believed that there is no case in which sales, thereunder, were held void. This doubt first appeared in the case of *Croft v. Powell*, Comyns. 603, and was subsequently fortified by the re-

marks of Lord Eldon in the case of *Roberts v. Bozon*, 1 Pow. Mort. 9a, note. There seems, however, to be no reason why the absolute owner of the fee should not have the power to authorize any one to sell it for his benefit, except that when such a power is given to the mortgagee for his own benefit he may abuse the trust. See *Demarest v. Wynkoop*, 3 Johns. Ch. (N. Y.) 129, 8 Am. Dec. 467; *Waters v. Randall*, 47 Mass. (6 Metc.) 479; *Kinsley v. Ames*, 43 Mass. (2 Metc.) 29; *Eaton v. Whiting*, 20 Mass. (3 Pick.) 484; *Clark v. Condit*, 18 N. J. Eq. (3 C. E. Gr.) 358; *Corder v. Morgan*, 18 Ves. 344.

to bar the equity of redemption, they must be made strictly in accordance with the requirements of such statutes.²

The statute of a state regulating the foreclosure of mortgages by advertisement, does not apply to mortgages on real estate without the state;³ consequently, the courts of New York have refused to enjoin a resident mortgagee of lands situated without the state, from selling them by public sale within the state according to the terms of the mortgage, merely on the allegation that such power is void, where it does not appear that the power is void by the law of the state, or territory, where the lands are situated.⁴

While it is necessary under the statute to have a mortgage duly recorded in the county where the premises are situated, before it can be foreclosed by advertisement,⁵ such provision is wholly for the benefit of the purchaser, and an omission to have it so recorded will not affect the validity of the sale.⁶

§ 914. What mortgages may be foreclosed by advertisement.—Every mortgage containing a power of sale may be foreclosed by advertisement,⁷ providing it was executed by parties of competent age; but, if it was executed by

² *Lawrence v. Farmers' Loan & Trust Co.* 13 N. Y. 200, 211.

³ *Elliott v. Wood*, 45 N. Y. 71. See *post*, § 947.

⁴ *Central Gold Mining Co. v. Platt*, 3 Daly (N. Y.) 263. See *Carpenter v. Black Hawk Co.* 65 N. Y. 43; *Elliott v. Wood*, 45 N. Y. 71, *aff'g* 53 Barb. (N. Y.) 285.

⁵ *Wells v. Wells*, 47 Barb. (N. Y.) 416. See *Langmaack v. Keith*, 19 S. D. 351, 103 N. W. 210; *Kemmann v. Barton*, 26 S. D. 371, 128 N. W. 329.

⁶ *Jackson v. Colden*, 4 Cow. (N. Y.) 266; *Wilson v. Troup*, 2 Cow. (N. Y.) 195, 14 Am. Dec. 458, *aff'g*

7 Johns. Ch. (N. Y.) 25, and see *Shelby v. Bowden*, 16 S. D. 531, 94 N. W. 416; *Bergen v. Bennett*, 1 Cai. Cas. (N. Y.) 1, 2 Am. Dec. 281; Compare *Wells v. Wells*, 47 Barb. (N. Y.) 416.

⁷ *Grant County v. Colonial and United States Mortgage Company*. 3 S. D. 390, 53 N. W. 746. See *Kammann v. Barton*, 26 S. D. 371, 128 N. W. 329.

In Wisconsin, the statutory form of mortgage which contains no power of sale, cannot be foreclosed by advertisement. *Dawson v. Bauch*, 149 Wis. 144, 135 N. W. 535.

persons under the statutory age, it cannot be so foreclosed.⁸ Where a mortgage, containing a power of sale, covenants for insurance, a failure to comply with the covenant will constitute such a default as to entitle the mortgagee to sell under the power contained in the mortgage, even though it may be impossible to comply with the covenant.⁹

To this general rule, however, there are some exceptions. Thus, it has been held that a mortgage given to secure unliquidated damages cannot be foreclosed by advertisement under the statute,¹⁰ and that the mortgage upon the property of an habitual drunkard cannot be so foreclosed, because proceedings for foreclosure cannot be instituted against the property of an habitual drunkard unless leave of the supreme court is first obtained.¹¹ In *VanBergen v. Demarest*,¹² it was held that on the application of an infant heir to the mortgagor, chancery will intervene and order the sale to be made under the direction of a master or referee, associated with the mortgagee.

And the supreme court of Michigan, in the case of *Olcott v. Crittenden*,¹³ say that statutory foreclosure is not adapted to cases where there are conflicting equities which can only be protected in a court of chancery. And it has been said by the supreme court of Minnesota, that after the execution, delivery and recovery of a quitclaim deed the legal effect of which is to release and discharge a mortgage of record, the mortgagee cannot foreclose the mortgage by advertisement, and that consequently such foreclosure proceedings are void and of no effect.¹⁴

It has been held that one of several mortgages made by an incompetent person, which in a suit for their cancellation has been allowed by the court to stand as security for benefits actually received by the mortgagor, and which by the decree

⁸ *Burnet v. Denniston*, 5 Johns. Ch. (N. Y.) 35.

⁹ *Walker v. Cockey*, 38 Md. 75.

¹⁰ *Ferguson v. Kimball*, 3 Barb. Ch. (N. Y.) 619. See *Ferguson v. Ferguson*, 2 N. Y. 360.

¹¹ *In re Parker*, 6 Alb. L. J. 324.

¹² 4 Johns. Ch. (N. Y.) 37.

¹³ 68 Mich. 230, 36 N. W. 41.

¹⁴ *Benson v. Markoe*, 41 Minn. 112, 42 N. W. 787.

has been changed in its terms as to rate of interest and time of payment, and foreclosure thereof enjoined until the other mortgages are canceled and the notes surrendered,—cannot be foreclosed by advertisement, but foreclosure must be by proceeding in chancery, in which compliance with the terms of the decree must be alleged and proved.¹⁵ And it is thought that foreclosures on reversions and equities may come within a rule of necessity and practicability, upholding the only possession of which the mortgaged estate is reasonably capable.¹⁶

§ 915. Foreclosure by advertisement, where part of debt otherwise collected.—Where a mortgage has been foreclosed by an action for a part of the debt, and the decree provided for a second sale on a subsequent default, a foreclosure cannot be conducted by advertisement.¹⁷ And if a suit or a proceeding at law has been commenced to recover the debt secured by a mortgage, a foreclosure by advertisement cannot be had, unless such suit or proceeding is first discontinued, or an execution issued on the judgment recovered therein has been returned unsatisfied in whole or in part.¹⁸

It is thought, however, that the right to foreclose will not be extinguished, where an assignee of the mortgage takes a quitclaim deed of one-half of the mortgaged premises; at most, such a deed can operate only to extinguish a portion of the mortgage debt, and the assignee will be at liberty to foreclose for the residue,¹⁹ because, in the absence of any

¹⁵ *Strong v. Tomlinson*, 88 Mich. 112, 50 N. W. 106.

¹⁶ *Bartlett v. Sanborn*, 64 N. H. 70, 6 Atl. 486. See *Palmer v. Fowley*, 71 Mass. (5 Gray) 545; *Penniman v. Hollis*, 13 Mass. 429; *Colby v. Poor*, 15 N. H. 198.

¹⁷ *Cox v. Wheeler*, 7 Paige Ch. (N. Y.) 248, 250. See *Grosvenor v. Day*, Clarke Ch. (N. Y.) 109.

¹⁸ *Grosvenor v. Day*, Clarke Ch. (N. Y.) 109.

¹⁹ *Klock v. Cronkhite*, 1 Hill (N. Y.) 107.

words of restriction, an assignment of a legal interest in a mortgage passes the power of sale with the debt secured.²⁰

The payment of a mortgage extinguishes the power of sale contained in it; if a statutory foreclosure is conducted thereafter, a *bona fide* purchaser at the sale will acquire no title in the premises.²¹ A sale under a power, after a tender of the mortgage debt by one entitled to redeem, will be irregular and void.²²

§ 916. Who may foreclose by advertisement.—The foreclosure of a mortgage by advertisement must be made by or in the name of the real party in interest.²³ In those states where mortgages are regarded as real chattel interests in the premises, the personal representatives of a deceased mortgagee may prosecute a statutory foreclosure.²⁴ This rule includes the assignee of a mortgage,²⁵ or his executors or administrators. A surviving executor may foreclose by advertisement;²⁶ so may a foreign executor or administrator.²⁷ It has been held in *Wilson v. Troup*,²⁸ that the fact that a mortgagee has attempted to convey portions of the mortgaged premises will not affect his right to foreclose in his own name.

Where a mortgage secures several notes held by different parties, only the holder of the mortgage is entitled to fore-

²⁰ *Slee v. Manhattan Ins. Co.* 1 Paige Ch. (N. Y.) 48.

²¹ *Cameron v. Irwin*, 5 Hill (N. Y.) 272. See *Warner v. Blakeman*, 36 Barb. (N. Y.) 501, aff'd 4 Keyes (N. Y.) 487.

²² *Burnet v. Denniston*, 5 Johns. Ch. (N. Y.) 35.

²³ *Cohoes Co. v. Goss*, 13 Barb. (N. Y.) 137; *Wilson v. Troup*, 2 Cow. (N. Y.) 195, 14 Am. Dec. 458. See also *ante*, § 312.

²⁴ *Demarest v. Wynkoop*, 3 Johns. Ch. (N. Y.) 129, 8 Am. Dec. 467.

²⁵ *Cohoes Co. v. Goss*, 13 Barb. (N. Y.) 137; *Wilson v. Troup*, 2 Cow. (N. Y.) 195, 231, 14 Am. Dec. 458; *Maslin v. Marshall*, 94 Md. 480, 51 Atl. 85.

²⁶ *Demarest v. Wynkoop*, 3 Johns. Ch. (N. Y.) 129, 8 Am. Dec. 467.

²⁷ *Averill v. Taylor*, 5 How. (N. Y.) Pr. 476, 1 N. Y. Code Rep. N. S. 213; *Doolittle v. Lewis*, 7 Johns. Ch. (N. Y.) 45, 11 Am. Dec. 389.

²⁸ 7 Johns. Ch. (N. Y.) 25, aff'g 2 Cow. (N. Y.) 195, 14 Am. Dec. 458.

close under the power of sale. After a foreclosure and sale, he will be deemed to hold the proceeds as trustee for the parties in interest.²⁹ It is believed, however, to be the better practice in those cases where two or more persons are jointly interested in the mortgage, for all to join in its foreclosure.³⁰

A deputy sheriff may sell land on foreclosure of mortgage by advertisement.³¹ Under the statutes of Michigan,³² providing that a bank may hold such real estate as it shall purchase at sale under judgments, "decrees or mortgage foreclosures," under securities held by it, a bank may foreclose by advertisement a mortgage containing a power of sale.³³ The foreclosure of a mortgage by advertisement in the name of the mortgagee is void where the mortgagee is at the time deceased.³⁴ But a sale under a power in a trust deed is not void because the trustee was the real owner of the note secured thereby, at the time the deed was executed.³⁵

The supreme court of North Dakota, say the record must show complete title to the mortgage in a party seeking to foreclose a mortgage by advertisement, claiming such right as assignee; otherwise such foreclosure will be a nullity.³⁶ And in those cases where the mortgagee is dead a foreclosure by advertisement upon a notice of sale purporting to be given by authority of the mortgagee, is void; nor can it be cured by proof that in fact the notice was given by authority of another person.³⁷ Likewise where a sale is made by a mort-

²⁹ *Solberg v. Wright*, 33 Minn. 224; *Bottineau v. Aetna Ins. Co.* 31 Minn. 125; *Brown v. Delaney*, 22 Minn. 349. See *Wilson v. Troup*, 2 Cow. (N. Y.) 195, 14 Am. Dec. 458; *Slee v. Manhattan Ins. Co.* 1 Paige Ch. (N. Y.) 48.

³⁰ *Wilson v. Troup*, 7 Johns. Ch. (N. Y.) 25 aff'g 2 Cow. (N. Y.) 195, 231, 14 Am. Dec. 458.

³¹ *Heinmiller v. Hatheway*, 60 Mich. 391, 27 N. W. 558.

³² 3 How. Mich. Annotated Stat. 3208b.

³³ *Gage v. Sanborn*, 106 Mich. 269, 64 N. W. 32.

³⁴ *Welsh v. Cooley*, 44 Minn. 446, 46 N. W. 908.

³⁵ *Cassady v. Wallace*, 102 Mo. 575, 15 S. W. 138.

³⁶ *Morris v. McKnight*, 1 N. D. 266, 47 N. W. 375.

³⁷ *Bausman v. Kelley*, 38 Minn. 197, 36 N. W. 333, 8 Am. St. Rep. 661.

gagee after he has parted with his interest in the property it is void.³⁸

§ 917. Notice of sale.—Publication.³⁹—The requirements as to the contents and publication of the notice in foreclosure by advertisement are purely statutory. The New York Code of Civil Procedure provides,⁴⁰ that the person entitled to execute a power of sale must give notice to all parties in the manner prescribed,⁴¹ that the mortgage will be foreclosed by a sale of the mortgaged premises, or a part thereof, at a time and place specified in the notice. It requires that “a copy of the notice must be published, at least once in each of the twelve weeks, immediately preceding the day of the sale,⁴² in a newspaper published in the county or in a municipal corporation a part of which is within the county in which the property to be sold, or a part thereof, is situated.⁴³”

Substantial compliance with the statutory requirements will be sufficient.⁴⁴ It is thought that it is not necessary that the

³⁸ *Sadler v. Jefferson*, 143 Ala. 669, 39 So. 380.

³⁹ See *ante*, § 315.

⁴⁰ N. Y. Code Civ. Proc. § 2388.

⁴¹ The provisions of the statute as to the publication, posting and service of the notice must be strictly complied with, or the proceedings will be void. *Cole v. Moffitt*, 20 Barb. (N. Y.) 18; *Stanton v. Kline*, 16 Barb. (N. Y.) 9; *King v. Duntz*, 11 Barb. (N. Y.) 191; *VanSlyke v. Shelden*, 9 Barb. (N. Y.) 278. See also *Ford v. Nesbitt*, 72 Ark. 267, 79 S. W. 793.

⁴² In computing the time for the publication, posting and service of the notice, the first day is to be excluded and the last day included. *Bunce v. Reed*, 16 Barb. (N. Y.) 347; *Hornby v. Cramer*, 12 How. (N. Y.) Pr. 490, 493; *Westgate v. Handlin*, 7 How. (N. Y.) Pr. 372.

⁴³ N. Y. Code Civ. Proc. § 2388. As to the notice of sale by publication, see *ante*, § 547. Where the land is situated in more than one county, the publication required by statute may be made in a newspaper in either county. *Wells v. Wells*, 47 Barb. (N. Y.) 416.

⁴⁴ *McCardia v. Billings*, 10 N. D. 373, 88 Am. St. Rep. 729, 87 N. W. 1008. See *Shaw v. Smith, as assignee etc.* 107 Md. 523, 69 Atl. 116; *Turansky v. Weinberg*, 211 Mass. 324, 97 N. E. 755; *Hansom v. Kitterman*, 23 S. D. 220, 121 N. W. 389; *Gold Dirt Mining & Milling Co. v. Perigo Mines, Land & Townsite Corporation*, 48 Colo. 197, 109 Pac. 263; *Weyburn v. Watkins*, 90 Miss. 728, 44 So. 145; *Drake v. Rhodes*, 155 Ala. 498, 130 Am. St. Rep. 62, 46 So. 769; *Johnson v. Wood*, 125 Ala. 330, 28 So. 454;

sheriff at the time of a foreclosure sale by advertisement should have before him an affidavit of the notice of sale.⁴⁵ And in the absence of a requirement to that effect either in the statute or the instrument the donee is under no obligation, so long as he acts within terms of the power, to give any notice, other than the general notice prescribed in the power, of what he intends to do.⁴⁶

It is thought that a foreclosure sale by advertisement is not invalidated by failure of the notice of sale to give the book and page of the register of the assignment of the mortgage, where it is not required by statute.⁴⁷ Neither will the foreclosure be invalidated by the fact that the notice fails to name the mortgagor or mortgagee or any person connected with the mortgage, if the place of record is correctly stated.⁴⁸

A sale by advertisement under a power in a mortgage or trust deed is not invalid because the notice fails to state the actual amount due;⁴⁹ and a statutory foreclosure under

Grandin v. Emmons, 10 N. D. 223, 54 L.R.A. 610, 88 Am. St. Rep. 684, 86 N. W. 723; *Brown v. Wentworth*, 181 Mass. 49, 62 N. E. 984; *Baker v. Cunningham*, 162 Mo. 134, 85 Am. St. Rep. 490, 62 S. W. 445; *Mallory v. Kessler*, 18 Utah 11, 54 Pac. 892; *Wilson v. Wall*, 99 Va. 353, 38 S. E. 181; *Sandusky v. Faris*, 49 W. Va. 150, 38 S. E. 563.

Maryland Act, 1889, c. 98, commonly known as the Annexation Act, does not affect a power of sale contained in a mortgage further than to require notice to be given as provided in the Baltimore City Local Code, art. 4, § 792; *Chilton v. Brooks*, 71 Md. 445, 18 Atl. 868, 28 Am. & Eng. Corp. Cas. 32.

A sale under West Virginia Code, 1868, c. 166, § 2, is not invalid because the notice of sale did not conform to that statute, where its

publication was completed before the statute took effect. *Fowler v. Lewis*, 36 W. Va. 112, 14 S. E. 447.

⁴⁵ *McCammon v. Detroit L. & N. R. Co.* 103 Mich. 104, 61 N. W. 273.

⁴⁶ *Reynolds v. Hennessey*, 15 R. I. 513, 8 Atl. 715.

⁴⁷ *McCammon v. Detroit L. & N. R. Co.* 103 Mich. 104, 61 N. W. 273.

⁴⁸ *Colgan v. McNamara*, 16 R. I. 554, 18 Atl. 157. But see *Zlotocizski v. Smith*, 117 Mich. 202, 75 N. W. 470.

⁴⁹ See *Sawyer v. Bradshaw*, 125 Ill. 440, 17 N. E. 812; *Cook v. Foster*, 96 Mich. 610, 55 N. W. 1619; *Lewis v. Duane*, 69 Hun (N. Y.) 28, 23 N. Y. Supp. 433, 52 N. Y. S. R. 818.

In Illinois, on a bill to set aside a trust deed and sale thereunder as fraudulent against creditors, com-

the Michigan⁵⁰ or New York⁵¹ statutes, is not vitiated by an over-statement in the notice of sale, without fraudulent intent, of the amount due on the mortgage,⁵²—as by including a payment not due at its date; if it becomes due before the first publication, the mortgagee does not act in bad faith, and no one is misled thereby.⁵³

Where the notice is published once in each week for twelve successive weeks, as required by statute, it will be sufficient, even though all the publications are made within seventy-eight days, provided the first publication is eighty-four days prior to the day of sale, excluding the day on which the sale is made.⁵⁴ The first publication, to be sufficient, must in all cases be at least eighty-four days before the day of sale, the first day being excluded and the last one included.⁵⁵

Where a mortgage contains a provision in a power of sale requiring that twenty days' notice of sale should be given in some newspaper, this is construed to mean a continuous notice for twenty days; and a notice in a daily newspaper on seven days only, at intervals during twenty days preceding sale is not sufficient.⁵⁶ But it is thought that if the mortgagee in good faith selects a weekly paper, the insertion of the notice in each issue of the paper for the designated period will fulfill all the requirements.⁵⁷ A lapse of nine days, however, after the last publication, renders the sale a nullity, when the in-

plainant cannot avail himself of the fact that a notice of sale did not state the actual amount due, as required by statute. *Sawyer v. Bradshaw*, 125 Ill. 440, 17 N. E. 812.

⁵⁰ *Cook v. Foster*, 69 Mich. 610, 55 N. W. 1019.

⁵¹ *Lewis v. Duane*, 69 Hun (N. Y.) 28, 23 N. Y. Supp. 433, 52 N. Y. S. R. 818.

⁵² *Lewis v. Duane*, 69 Hun (N. Y.) 28, 52 N. Y. S. R. 818, 23 N. Y. Supp. 433.

⁵³ *Cook v. Foster*, 96 Mich. 610, 55 N. W. 1019.

⁵⁴ *Howard v. Hatch*, 29 Barb. (N. Y.) 297. See *Anonymous*, 1 Wend. (N. Y.) 90. See *post*, § 918.

⁵⁵ *Bunce v. Reed*, 16 Barb. (N. Y.) 347.

⁵⁶ *Washington v. Bassett*, 15 R. I. 563, 10 Atl. 625, 2 Am. St. Rep. 929.

⁵⁷ *Washington v. Bassett*, 15 R. I. 563, 2 Am. St. Rep. 929, 10 Atl. 625; *Atkinson v. Washington & Jefferson College*, 54 W. Va. 32, 46 S. E. 253; *Vizard v. Moody*, 119 Ga. 918, 47 S. E. 348; *Hamilton v. Fowler*, 99 Fed. 18, 40 C. C. A. 47 (Tenn.). See also *Thomas v.*

strument required publication "for four weeks next before the day of sale."⁵⁸

It is said by the supreme court of South Carolina that a failure of a master to advertise a sale under foreclosure for the full statutory period, is a mere irregularity which will not avoid the sale under the statute of that state⁵⁹ regulating the time of the advertisement, and putting such sales on the same footing as those under execution.⁶⁰

It is thought that the advertisement of a sale by an administrator of a mortgagee in whom, his administrators and assigns, a power of sale was vested, may properly be signed by him as assignee of the mortgagee, without setting out that the assignment was by act of law, and not by act of the parties.⁶¹ It is held in Minnesota that a notice of sale under a mortgage with power of sale, covering separate tracts of land lying in different counties, need be published only in a newspaper in any one of such counties, under a statute,⁶² providing that the notice shall be published in a newspaper printed and published in the county where the premises intended to be sold, "or some part thereof" are situated.⁶³ It is said that the Illinois statute, requiring notice of sale under a power in a mortgage to be published once in a week for four successive weeks controls, although the mortgage provides for a different notice.⁶⁴ But a sale under such power is not void, but

Issenhuth, 18 S. D. 303, 100 N. W. 436.

⁵⁸ *McMahan v. American Building & Loan & Tontine Savings Ass'n*, 75 Miss. 965, 23 So. 431.

⁵⁹ S. C. Gen Stat. § 2424.

⁶⁰ *Alexander v. Messervey*, 35 S. C. 409, 14 S. E. 854.

⁶¹ *Thurber v. Carpenter*, 18 R. I. 782, 31 Atl. 5.

⁶² Minn. Gen. Stat. 1878, c. 81, § 5.

⁶³ *Paulle v. Wallis*, 58 Minn. 192, 59 N. W. 999.

In Maryland a sale of mortgaged

premises under the Code, 1888, art. 66, by virtue of a consent thereto contained in the mortgage, may properly be advertised in the city of Baltimore and confirmed by the circuit court of that city, when at the time of the sale the mortgaged property is within the city limits, though it was not so when the mortgage was made. *Roberts v. Loyola Perpetual Bldg. Assoc.* 74 Md. 1, 21 Atl. 684.

⁶⁴ *Cornell v. Newkirk*, 144 Ill. 241, 33 N. E. 37, aff'g. 44 Ill. App. 487

only voidable, because of failure to comply with the statute requiring notice to be published for four successive weeks, where actual notice is given and the property sells for its full value.⁶⁵ A sale, however, under a naked power of sale in a trust deed is invalid where, after three days' publication of notice, it is discovered that the day advertised for the sale will fall on Sunday, whereupon the notice is changed to read the following day, and as thus corrected is published, after the change is made, one day less than the time which is required by the trust deed.⁶⁶

§ 918. What is a valid publication of the notice.—The publication of the notice of sale in foreclosure by advertisement must strictly comply with the requirements of the statute and the mortgage.⁶⁷ Thus it has been said that an attempt to foreclose a mortgage by advertisement under the Maine statute⁶⁸ is fatally defective unless the date of the newspaper in which the notice was last published is recorded.⁶⁹ But in those cases where the record of a mortgage incorrectly states the place where publication is to be made, this will not avoid the notice and invalidate the sale where the notice is duly published as required in the mortgage.⁷⁰

The validity of the publication will not be affected by the fact that the paper in which the notice was published was not calculated to give general information of the sale.⁷¹ Neither will a change in the name of the paper in which the notice is inserted, and its removal to and consolidation with another

⁶⁵ *Cornell v. Newkirk*, 144 Ill. 241, 33 N. E. 37, aff'g. 44 Ill. App. 487.

⁶⁶ *Wolff v. Ward*, 104 Mo. 127, 16 S. W. 161.

⁶⁷ *Brett v. Davenport, as trustee, etc.* 151 N. C. 56, 65 S. E. 611; *Clark v. Burke*, 39 S. W. 306 (Tex.) See *Moore v. Dick*, 187 Mass. 207, 72 N. E. 967; *Quinn v. McDole*, 28 R. I. 327, 67 Atl. 327; *Childs v. Hill*, 20 Tex. Civ. App. 162, 49 S. W.

652; *National Loan & Investment Co. v. Dorenblaser*, 30 Tex. Civ. App. 148, 69 S. W. 1019.

⁶⁸ Me. Rev. Stat. c. 90, § 5.

⁶⁹ *Hollis v. Hollis*, 84 Me. 96, 24 Atl. 581.

⁷⁰ *Colgan v. McNamara*, 16 R. I. 554, 18 Atl. 157.

⁷¹ *Blake v. Dennett*, 49 Me. 102. See *Bragdon v. Hatch*, 77 Me. 433.

paper in the same county, affect the validity of the publication of the notice, provided the paper otherwise retains its identity and the advertisement is regularly inserted.⁷²

Where the publication of the notice of sale is defective, in not being made as required by statute, the proceedings will be void. Thus, the publication of such a notice in a weekly newspaper dated on Saturday, the greater part of the edition being printed on Friday, has been held not to be a sufficient publication within the statute for the foreclosure of a mortgage maturing on such Friday.⁷³ Where the original publication of a notice is defective, a republication thereof, with several notices of postponement, for twelve weeks, will be a sufficient compliance with the statute.⁷⁴

Where the Code requires that the first publication of the notice must be eighty-four days prior to the day of sale specified in the notice, it is thought that the twelve publications may be made in less than eighty-four days, if they are made once a week for twelve weeks.⁷⁵

The supreme judicial court of Massachusetts, in the case of *Steveson v. Hano*,⁷⁶ say that a sale under a power in a mortgage, requiring an advertisement to be made in "one newspaper published in Boston," is properly advertised in a paper published in Brighton, which is a part of Boston, although having a circulation of only about 500 copies, where the property is an unoccupied lot of moderate value, and the newspaper is the one nearest to the land, and is read among the neighbors.⁷⁷ And the supreme court of Rhode Island, in the case of *Colgan v. McNamara*,⁷⁸ hold that an advertisement of a sale under a power contained in a mortgage which required publication of notice in some newspaper in the county

⁷² *Perkins v. Keller*, 43 Mich. 53.

⁷³ *Pratt v. Tinkcom*, 21 Minn. 142.

⁷⁴ *Cole v. Moffitt*, 20 Barb. (N. Y.) 18.

⁷⁵ *Howard v. Hatch*, 29 Barb. (N. Y.) 297; *George v. Arthur*, 2 Hun

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(N. Y.) 406; *Gantz v. Toles*, 40 Mich. 725. See *ante*, § 917.

⁷⁶ 148 Mass. 616, 20 N. E. 200.

⁷⁷ See *Hedlin v. Lee, as sheriff*, etc. 21 N. D. 495, 131 N. W. 390.

⁷⁸ 16 R. I. 554, 18 Atl. 157.

of Providence, in said state, is not insufficient because it appeared in a newspaper published at a place in the county other than one of two certain cities in which the record of the mortgage erroneously required notice to be published.

§ 919. Posting notice of sale.—The New York Code provides,⁷⁹ that “a copy of the notice must be fastened up, at least eighty-four days before the day of the sale, in a conspicuous place, at or near the entrance of the building, where the county court of each county, wherein the property to be sold is situated, is directed to be held; or, if there are two or more such buildings in the same county, then in a like place, at or near the entrance of the building nearest to the property; or, in the city and county of New York, in a like place, at or near the entrance of the building, where the trial and special terms of the supreme court of the first judicial district are directed by law to be held.”

It is only required that the notice should be affixed to the door of the building where the county courts are held; it is not necessary for the person who affixed the notice to see it there afterwards,⁸⁰ because where the notice is once affixed, it is presumed that it will remain so. Affixing the notice once seems to satisfy the words of the statute, and it is said that a weekly inspection, though prudent, is not necessary.⁸¹ Where the land is situated in two or more counties, the notice of sale must be fastened up at or near the court house door in each county, in order to sustain the sale of the land in that county.⁸²

§ 920. Delivering notice of sale to county clerk—His duty.—The New York Code also provides,⁸³ that “a copy

⁷⁹ N. Y. Code Civ. Proc. § 2388.

⁸² *Wells v. Wells*, 47 Barb. (N.

⁸⁰ *Merritt v. Bowen*, 7 Cow. (N. Y.) 13; *Hornby v. Cramer*, 12 How. (N. Y.) Pr. 490.

Y.) 416.

⁸³ N. Y. Code Civ. Proc. § 2388.

⁸¹ *Hornby v. Cramer*, 12 How. (N. Y.) Pr. 490.

of the notice must be delivered, at least eighty-four days before the day of sale, to the clerk of each county, wherein the mortgaged property, or any part thereof, is situated.”⁸⁴ Where a notice of sale filed in the clerk’s office and published for the first four weeks, was, by mistake, dated April 23, 1858, instead of 1868, the court held that the mistake was obvious on inspection and could not have misled any one, and for that reason did not invalidate the proceedings.⁸⁵

“A county clerk, to whom a copy of a notice of sale is delivered, as prescribed by the Code,⁸⁶ must forthwith affix it in a book, kept in his office for that purpose; must make and subscribe a minute, at the bottom of the copy, of the time when he received and affixed it; and must index the notice to the name of the mortgagor.”⁸⁷

The supreme court of New York, in the case of *Van Vleck v. Enos*,⁸⁸ say that the omission of the clerk to enter in the book in which notices of foreclosures and sale were affixed, at the bottom of the notice, the time of receiving and affixing the same, and to index the notices to the name of the mortgagor, as required by the New York statutes with reference to foreclosure by advertisement as they stood in 1869, is fatal to the validity of the foreclosure.

§ 921. Personal service of notice—Who entitled to.—

The parties who are to be served with the notice of sale on a foreclosure by advertisement, are those whom the statute directs to be served and no others, because a sale under a power, which conforms to the statute regulating such sales, forecloses all rights and interests which are subject to the power,⁸⁹ and service upon parties not subject to such power is invalid.

The New York Code⁹⁰ requires that a copy of the notice

⁸⁴ *Wells v. Wells*, 47 Barb. (N. Y.) 416.

⁸⁵ *Mowry v. Sanborn*, 68 N. Y. 163, reversing 62 Barb. (N. Y.) 223, 65 N. Y. 581.

⁸⁶ § 2388, subd. 3.

⁸⁷ N. Y. Code Civ. Proc. § 2390.

⁸⁸ 88 Hun (N. Y.) 348, 34 N. Y. Supp. 754.

⁸⁹ *Brackett v. Baum*, 50 N. Y. 8.

⁹⁰ N. Y. Code Civ. Proc. § 2388.

must be served on the mortgagor, or if he is dead, upon his executor or administrator, if one has been appointed, and also upon his heirs, providing he died the owner of the mortgaged premises. A copy may also be served upon other persons having an interest in the premises, such as subsequent grantees, mortgagees, judgment creditors or other lienors.⁹¹ It is held that service of the notice is as necessary as the publication or posting thereof.⁹²

"The notice is required to be subscribed by the person entitled to execute the power of sale, unless his name distinctly appears in the body of the notice, in which case it may be subscribed by his attorney or agent."⁹³ If service of the notice is not made upon a party entitled thereto, his claim will not be barred or foreclosed, nor will his rights be affected by the sale; the assignee of a subsequent incumbrance stands in place of the original owner thereof. Actual notice of the sale will not be sufficient.⁹⁴

Notice of the sale must be given to the mortgagor,⁹⁵ and also to the owner of the equity of redemption, or the sale will be void as to them.⁹⁶

Where a junior mortgagee is in possession, a foreclosure by advertisement of a prior mortgage without notice to him is void;⁹⁷ but no subsequent waiver of the failure to serve

⁹¹ See *post*, §§ 922-925.

⁹² *Rathbone v. Clarke*, 9 Abb. (N. Y.) Pr. 66, note; *Cole v. Moffitt*, 20 Barb. (N. Y.) 18; *Stanton v. Kline*, 16 Barb. (N. Y.) 9; *King v. Duntz*, 11 Barb. (N. Y.) 191; *VanSlyke v. Sheldon*, 9 Barb. (N. Y.) 278.

⁹³ N. Y. Code Civ. Proc. § 2388.

⁹⁴ *Mowry v. Sanborn*, 65 N. Y. 581; *Root v. Wheeler*, 12 Abb. (N. Y.) Pr. 294; *Dwight v. Phillips*, 48 Barb. (N. Y.) 116; *Winslow v. McCall*, 32 Barb. (N. Y.) 241; *Wetmore v. Roberts*, 10 How. (N. Y.) Pr. 51; *Mickles v. Dillaye*, 15 Hun (N. Y.) 296.

⁹⁵ N. Y. Code Civ. Proc. § 2388. But see *Grove v. Great Northern Loan Co.* 17 N. D. 352, 138 Am. St. Rep. 707, 116 N. W. 345.

In Texas, personal notice is unnecessary. *Georgi v. Juerger*, 66 S. W. 873. (Tex.); *Fischer v. Simon*, 4 Tex. 39, 46 S. W. 447.

⁹⁶ *St. John v. Bumpstead*, 17 Barb. (N. Y.) 319; *Kellogg v. Dennis*, 38 Misc. 82, 77 N. Y. Supp. 172. But see *Shea v. Ballard*, 61 W. Va. 255, 123 Am. St. Rep. 981, 56 S. E. 472.

⁹⁷ *Casey v. McIntyre*, 45 Minn. 526, 48 N. W. 402.

notice by such occupant of the premises who is not the owner or authorized to bind him in the premises, will validate the foreclosure of a prior mortgage by advertisement, as respects the owner. And the supreme court of Minnesota say that acts of ownership without actual occupancy are insufficient to put in operation the provision of the statute of that state,⁹⁸ requiring that upon foreclosure of a mortgage by advertisement, a copy of the published notice shall be served, in like manner as a summons, on the person in possession of the mortgaged premises, if the same are actually occupied.⁹⁹

The presumption of the regularity of the proceedings in a foreclosure by advertisement, which arises from the certificate of sale, is rebutted by proof of failure to serve notice upon the occupant of the premises, where he is not the owner; and the certificate is not presumptive evidence in that case of the actual service of notice upon the owner.¹

§ 922. Service on personal representatives.—Where the mortgagor is dead, the notice must be served on his executor or administrator,² and where there is none, one must be appointed, and the prescribed service must be made upon him, in order to secure a valid foreclosure.³

It has been said, however, that if personal representatives have not been appointed, a foreclosure by advertisement is good, if conducted in the mode prescribed by statute, without service of the notice required to be served on the mortgagor's personal representative.⁴ The words "personal representa-

⁹⁸ Minn. Gen. Stat. 1878, c. 81, tit. 1, p. 842.

⁹⁹ *Moulton v. Sidle*, 52 Fed. 616.

¹ *Casey v. McIntyre*, 45 Minn. 526, 48 N. W. 402.

² *Cole v. Moffitt*, 20 Barb. (N. Y.) 18; *St. John v. Bumpstead*, 17 Barb. (N. Y.) 100; *Mackenzie v. Alster*, 64 How. (N. Y.) Pr. 388; *VanSchaack v. Saunders*, 32 Hun (N. Y.) 515; *Low v. Purdy*, 2 Lans. (N.

Y.) 422, N. Y. Code Civ. Proc. § 2388.

³ *Mackenzie v. Alster*, 64 How. (N. Y.) Pr. 388; *VanSchaack v. Saunders*, 32 Hun (N. Y.) 515.

⁴ *Stanley v. Freckleton*, 65 Hun (N. Y.) 138, 19 N. Y. Supp. 913, 47 N. Y. S. R. 383; *Bond v. Bond*, 51 Hun (N. Y.) 507, 21 N. Y. S. R. 682.

tive," as used in the statute regulating foreclosures by advertisement, mean "executor or administrator," and not heir or devisee.⁵ If the mortgagor died owner of the mortgaged premises, the notice must also be served upon his heirs.⁶

§ 923. Service of notice on subsequent grantees and lienors.—It is necessary to give the owner of the equity of redemption notice, in order to make a foreclosure valid as against him.⁷ As it is also necessary to give notice to a junior mortgagee,⁸ or his assignee, in order to render the foreclosure of a senior mortgage valid as against him, the assignment should be recorded, or the assignee will not be entitled to notice.⁹ The holder of a junior mortgage, through an unrecord-

⁵ See *Anderson v. Austin*, 34 Barb. (N. Y.) 319, where the rule that, under a statutory foreclosure by advertisement, notice of the sale must be given to the personal representatives of a deceased mortgagor, was construed in an action for partition between the heirs at law of such mortgagor, and a purchaser upon such a foreclosure sale,—where two mortgagors, husband and wife, owning separate parcels, united in a mortgage covering both parcels, and the husband left a will devising the premises and naming executors, but none were ever appointed or qualified, nor were administrators with the will annexed ever appointed upon his estate, and the wife died intestate, and no letters of administration were issued upon her estate. *VanSchaack v. Saunders*, 32 Hun (N. Y.) 515, citing *Mowry v. Sanborn*, 68 N. Y. 153; *In re Second Ave. Methodist Episc. Church*, 66 N. Y. 395; *Hartnett v. Wandell*, 60 N. Y. 346, 349, 19 Am. Rep. 194; *Lawrence v. Farmers' Loan & Trust Co.* 13 N. Y. 211; *Anderson v. Austin*, 34

Barb. (N. Y.) 319; *Bryan v. Butts*, 27 Barb. (N. Y.) 503; *Cole v. Moffitt*, 20 Barb. (N. Y.) 18; *Cohoes Co. v. Goss*, 13 Barb. (N. Y.) 137; *King v. Duntz*, 11 Barb. (N. Y.) 191; *Mackenzie v. Alster*, 64 How. (N. Y.) Pr. 388, 12 Abb. (N. Y.) N. C. 110; *Northrup v. Wheeler*, 43 How. (N. Y.) Pr. 123; *Leonard v. Morris*, 9 Paige Ch. (N. Y.) 90; *Shillaber v. Robinson*, 97 U. S. (7 Otto) 68, 24 L. ed. 967, 2 Barb. Ch. Pr. (2d ed.) 176.

In North Carolina, service of notice on the heirs of a deceased mortgagor is not necessary. *Carter v. Slocomb*, 122 N. C. 475, 65 Am. St. Rep. 714, 29 S. E. 720.

⁶ N. Y. Code Civ. Proc. § 2388.

⁷ *St. John v. Bumpstead*, 17 Barb. (N. Y.) 100, N. Y. Code Civ. Proc. § 2388. But see *Atkinson v. Washington & Jefferson College*, 54 W. Va. 32, 46 S. E. 253.

⁸ In Texas, a junior incumbrancer is not entitled to notice of sale. *Hampshire v. Greeves*, 143 S. W. 147. (Tex.).

⁹ *Winslow v. McCall*, 32 Barb. (N. Y.) 241; *Wetmore v. Roberts*,

ed assignment, must be served with notice, where the foreclosing mortgagee has actual knowledge of the interest of such assignee.¹⁰

Subsequent grantees and mortgagees, whose conveyances or mortgages are not recorded at the time of the first publication of the notice, are not entitled to service thereof, where their interests are unknown to the foreclosing mortgagee;¹¹ but where the statute requires notice to be served, not only on those subsequent grantees and mortgagees whose conveyances shall be upon record at the time of the first publication of the notice, but also upon all persons having a lien by or under a judgment, it has been held, that the lien of a judgment perfected after the publication of the first notice, but before the sale will not be extinguished, unless notice is served upon the judgment creditor as required by statute.¹²

In the event of the death of the subsequent grantee who was at the time of his death the owner of the mortgaged premises, service may be made upon his heirs.¹³

In New York it is held that an assignee in bankruptcy is not entitled to notice of sale on foreclosure by advertisement, unless the conveyance to him is recorded at the time of the first publication of notice; he being a subsequent grantee upon whom service of the notice is required, under the New York statute,¹⁴ only in case his conveyance is upon record at the time of such publication.¹⁵

§ 924. Service of notice on wife or widow of mortgagor or his grantee.—The New York Code requires,¹⁶

¹⁰ How. (N. Y.) Pr. 51; *Decker v. Boice*, 19 Hun (N. Y.) 152.

¹¹ *Soule v. Ludlow*, 3 Hun (N. Y.) 503, 6 T. & C. 24.

¹² See *Decker v. Boice*, 19 Hun (N. Y.) 152, aff'd 83 N. Y. 215 N. Y. Code Civ. Proc. § 2388, subd. 4.

¹³ *Groff v. Morehouse*, 51 N. Y. 503.

¹⁴ N. Y. Code Civ. Proc. § 2388, subd. 4.

¹⁵ N. Y. Code Civ. Proc. § 2388.

¹⁶ *Ostrander v. Hart*, 30 N. E. 504, 43 N. Y. S. R. 910, aff'g on rehearing, 130 N. Y. 406, 29 N. E. 744, 42 N. Y. S. R. 513.

¹⁷ N. Y. Code Civ. Proc. § 2388.

that a copy of the notice of sale shall be served "upon the wife or widow of the mortgagor, and upon the wife or widow of each subsequent grantee, whose conveyance was so recorded, then having an inchoate or vested right of dower, or an estate in dower, subordinate to the lien of the mortgagee." Where a wife has joined her husband in the execution of a mortgage, she thereby becomes a mortgagor, and as such is entitled to service of notice.¹⁷

The inchoate dower of the wife of the owner of premises, which are subject to a mortgage for the purchase money, will not be barred by foreclosure by advertisement, unless she is served with a notice of the sale.¹⁸ Service on her husband alone will not be sufficient, for while a wife does not derive title from her husband, yet she claims under him within the meaning of the statute, and a sale under the power must be regularly made in order to bar her dower.¹⁹

While an omission to serve the notice upon the mortgagor's widow, where she joined him in the execution of the mortgage, is probably not fatal to the foreclosure, yet it is such a defect that her dower will not be barred.²⁰ The wife of a subsequent grantee of mortgaged premises, is entitled to service of the notice of foreclosure by advertisement; if she is not served, her right of dower will not be cut off.²¹ And the wife of a grantee of premises already mortgaged for part of the purchase money, should be served with the notice, in order to bar her inchoate right of dower.²²

§ 925. Service of notice upon subsequent lienors.—The New York Code requires the notice to be served upon every

¹⁷ *Anderson v. Austin*, 34 Barb. (N. Y.) 319; *King v. Duntz*, 11 Barb. (N. Y.) 191; *Low v. Purdy*, 2 Lans. (N. Y.) 422.

¹⁸ *Northrop v. Wheeler*, 43 How. (N. Y.) Pr. 122.

¹⁹ *Brackett v. Baum*, 50 N. Y. 8.

²⁰ *King v. Duntz*, 11 Barb. (N. Y.) 191.

²¹ *Raynor v. Raynor*, 21 Hun (N. Y.) 36. See *Northrop v. Wheeler*, 43 How. (N. Y.) Pr. 122.

²² *Northrop v. Wheeler*, 43 How. (N. Y.) Pr. 122.

“person having a lien upon the property subsequent to the mortgage, by virtue of a judgment or decree, duly docketed in the county clerk’s office, and constituting a specific or general lien upon the property.”²³ It seems that the lien of a person entitled to notice, but upon whom the notice was not served, is not destroyed nor in any way affected by the sale, even though he had actual notice of such sale.²⁴

All judgment creditors, whose liens were perfected subsequently to the mortgage, are entitled to notice; and where the statute requires the notice to be served upon every person having a lien by or under a judgment, the lien of a judgment perfected after the publication of the first notice, and before the sale, will not be cut off, and the lienor’s right or redemption will not be barred, unless notice is served upon him as prescribed by the statute.²⁵

§ 926. Service of notice of sale—How made.—The New York Code of Civil Procedure provides,²⁶ that service of the notice of sale must be made as follows: (1) “Upon the mortgagor, his wife, widow, executor, or administrator, or a subsequent grantee of the property, whose conveyance is upon record, or his wife or widow; by delivering a copy of the notice, as prescribed in article first of title first of chapter fifth of this act, for delivery of a copy of a summons, in order to make personal service thereof upon the person to be served; or by leaving such a copy, addressed to the person to be served, at his dwelling-house, with a person of suitable age and discretion,²⁷ at least fourteen days before the day of sale. If said mortgagor is a foreign corporation, or being a neutral person, he, or his wife, widow, executor, or administrator, or a subsequent grantee of the property, whose convey-

²³ N. Y. Code Civ. Proc. § 2388.

²⁶ N. Y. Code Civ. Proc. § 2389.

²⁴ *Root v. Wheeler*, 12 Abb. (N. Y.) Pr. 294; *Wetmore v. Roberts*, 10 How. (N. Y.) Pr. 51.

²⁷ See *Brigham v. Connecticut Mutual Life Ins. Co.* 79 Minn. 350, 82 N. W. 668.

²⁵ *Groff v. Morehouse*, 51 N. Y. 503.

ance is upon record, or his wife or widow, is not a resident of or within the state, then service thereof may be made upon them in like manner, without the state, at least twenty-eight days prior to the day of sale.”²⁸

(2) “Upon any other person, either in the same method, or by depositing a copy of the notice in the post-office, properly inclosed in a post-paid wrapper, directed to the person to be served, at his place of residence, at least twenty-eight days before the day of sale.”²⁹

§ 927. Service of notice by mail.—In foreclosing a mortgage by advertisement, personal service of the notice of sale is not always necessary, though the parties to be served may reside in the same town as the party foreclosing, or his attorney. It will be a sufficient compliance with the statute, if properly directed copies of the notice of sale are deposited in the post-office, addressed to the parties to be served at the places where they reside.³⁰

Notice of the sale may be served on the mortgagor by mail, by depositing a properly directed copy thereof in any post-office in the state.³¹ If, by mistake, the notice is addressed to the mortgagor at a place other than his residence, the sale made thereunder will be void.³² The affidavit of service must show that the places to which the notices were mailed to the parties addressed, were the actual residences of such parties.³³ Where the affidavit fails to show these facts, the omissions will be fatal, because the proceedings to foreclose a mortgage by advertisement are strictly statutory, and omissions cannot be subsequently supplied, nor defects in the affidavits remedied, in a court of equity.³⁴

²⁸ N. Y. Code Civ. Proc. § 2389, as amended by Laws of 1887, chap. 685, see also § 419 *et seq.*

²⁹ N. Y. Code Civ. Proc. § 2389.

³⁰ *Stanton v. Kline*, 11 N. Y. 196.

³¹ *Bunce v. Reed*, 16 Barb. (N. Y.) 347.

³² *Robinson v. Ryan*, 25 N. Y. 320.

³³ *Dwight v. Phillips*, 48 Barb. (N. Y.) 116.

³⁴ *Dwight v. Phillips*, 48 Barb. (N. Y.) 116. *Contra*, *Bunce v.*

Reed, 16 Barb. (N. Y.) 347.

It has been said, that under a statute requiring the notice to be folded and directed, the direction must be written on the notice itself, if it is sent unsealed; if the direction is written upon an unsealed envelope, containing a notice sent as a circular, the service will not be sufficient.³⁵ If service of the notice is made by mail, the time is to be counted from its deposit, and not from the date of the post-mark, or the time of forwarding.³⁶ Where the service is made by mail upon a person, naming him as "administrator," such service will be sufficient, if the notice is addressed to the proper person, without adding the word "administrator."³⁷

§ 928. Contents of notice of sale.—The New York Code of Civil Procedure requires,³⁸ that the notice of sale must specify: "(1) The names of the mortgagor,³⁹ of the mortgagee and of each assignee⁴⁰ of the mortgage. (2) The date of the mortgage,⁴¹ and the time when, and the place where, it is recorded. (3) The sum claimed to be due upon the mortgage, at the time of the first publication of the notice, and, if any sum secured by the mortgage is not then due, the amount to become due thereupon. (4) A description of the mortgaged property, conforming substantially to that contained in the mortgage."

The notice should show that the purpose of the sale is to

³⁵ *Rathbone v. Clarke*, 9 Abb. (N. Y.) Pr. 66 n.

³⁶ *Hornby v. Cramer*, 12 How. (N. Y.) Pr. 490. Thus, where the act requires the letter containing the notice to be deposited in the postoffice twenty-eight days prior to the time specified for the sale, the twenty-eight days are to be counted from the time of deposit, and not from the time of the post-mark or the forwarding of the letter.

³⁷ *George v. Arthur*, 2 Hun. (N. Y.) 406, 4 T. & C. (N. Y.) 635.

See *Howard v. Hatch*, 29 Barb. (N. Y.) 297.

³⁸ N. Y. Code. Civ. Proc. § 2391.

³⁹ A notice which describes one of the mortgagors as "Julia" when her name is "Tofila," is fatally defective. *Zlotocizski v. Smith*, 117 Mich. 202, 75 N. W. 470.

⁴⁰ *Weir v. Birdsall*, 27 App. Div. 404, 50 N. Y. Supp. 275.

⁴¹ A mistake in the date of the mortgage is not fatal. *Brown v. Burney*, 128 Mich. 205, 87 N. W. 221.

foreclose the mortgage, or what is equivalent, that a sale will be had by virtue of a power contained in the mortgage.⁴² It is believed that most persons would readily perceive the purpose of the notice, even if it were not distinctly stated; for that reason it is not necessary to state distinctly that the mortgage will be foreclosed, if notice of a sale according to the requirements of the statute is given.⁴³ Words which would import a sale of the mortgage, instead of a sale of the land, if literally construed, will not vitiate the notice, if the apparent meaning is that a sale of the land is intended.⁴⁴

The notice need not state that the subscribers have a lawful right or authority to foreclose;⁴⁵ and where executors or administrators seek to foreclose by advertisement, it is not necessary that their authority to do so should be set forth in the notice. It will be sufficient if they subscribe the notice as "administrators" or as "executors" of the last will and testament of the deceased mortgagee.⁴⁶

In those cases where the sale of the mortgaged premises is made under a power contained in the mortgage, a notice of foreclosure sale is not invalidated by failure to mention the amount of the taxes on the premises, when, after stating the amount then claimed to be due upon the mortgage, it states that the premises will be sold for such debt and interest "and the taxes, if any, on said premises."⁴⁷ Neither is such a notice insufficient because of such omission of the words "will be sold," so that it reads "the said mortgaged premises at public auction for cash, to the highest bidder."⁴⁸ And in those cases where the deed of trust contains no provisions requiring the successor of the original trustee to recite in his notice

⁴² *Judd v. O'Brien*, 21 N. Y. 186.

⁴³ *Leet v. McMaster*, 51 Barb. (N. Y.) 236.

⁴⁴ *Judd v. O'Brien*, 21 N. Y. 186.

⁴⁵ *People ex rel. Bridenbecker v. Prescott*, 3 Hun (N. Y.) 419.

⁴⁶ *People ex rel. Bridenbecker v. Prescott*, 3 Hun (N. Y.) 419.

⁴⁷ *Kirkpatrick v. Lewis*, 46 Minn. 146, 48 N. W. 783, aff'g on rehearing 47 N. W. 970.

⁴⁸ *Nau v. Brunette*, 79 Wis. 664, 48 N. W. 649.

of sale the circumstances which devolved the execution of the trust upon him, a misrecital, in such notice, of the ground upon which his right to act as trustee is based, is immaterial.⁴⁹

§ 929. **Description of mortgaged premises in notice.**—The description of the mortgaged premises in the notice of sale must conform substantially to that contained in the mortgage, or the sale will be invalid.⁵⁰ Thus, in a case where the mortgage referred to a map on file, and stated that the premises contained a particular number of acres, and the notice gave the number of the lot, but gave neither its metes, nor bounds, nor stated the quantity of land, and did not refer to the map or show whether the land was a village lot or a farm, it was held that the foreclosure did not comply with the statute, and was void. In such a case, a statement of the quantity of land and a reference to the map are substantial parts of the description, and must be given.⁵¹

However a slight variance in the description of the quantity of mortgaged premises between the mortgage and the notice is not fatal to the validity of the foreclosure, where there is no actual prejudice and it is not uncertain, obscure, or misleading as to what the bidder will acquire by his purchase.⁵²

§ 930. **Description of mortgage in notice.**—The notice of sale must specify the names of the mortgagor and the mortgagee, and of each assignee of the mortgage.⁵³ Where

⁴⁹ *Irish v. Antioch College*, 126 Ill. 474, 9 Am. St. Rep. 638, 18 N. E. 768.

⁵⁰ *Rathbone v. Clarke*, 9 Abb. (N. Y.) Pr. 66 n. See *Chace v. Morse as adm'r etc.* 189 Mass. 559, 76 N. E. 142; *Yellowly v. Beardsley*, 76 Miss. 613, 71 Am. St. Rep. 536, 24 So. 973. See also *People's Savings Bank of Woonsocket v. Wunderlick*, 178 Mass. 453, 86 Am. St. Rep. 493, 59 N. E. 1040.

⁵¹ *Rathbone v. Clarke*, 9 Abb. (N. Y.) Pr. 66 n.

⁵² *Schoch v. Birdsall*, 48 Minn. 441, 51 N. W. 382. See *Brown v. Wentworth*, 181 Mass. 49, 62 N. E. 984; *Beacon Hill Land Co. v. Bowen as adm'r etc.* 33 R. I. 404, 82 Atl. 81.

⁵³ N. Y. Code Civ. Proc. § 2391. It is thought, where a mortgage has been assigned as collateral security for a debt, and the debt is paid be-

two mortgages are being foreclosed, it is believed that a single notice will be insufficient, especially if the descriptions of the premises are not identical.⁵⁴ The notice will sufficiently specify the place where the mortgage is recorded, if it states the clerk's book and the date of record, although the number of the book may be erroneously given.⁵⁵

It seems that the omission of the name of the mortgagee from the notice⁵⁶ or a misstatement as to the date of the mortgage⁵⁷ is not a fatal error, where there is an accurate reference to the record of the mortgage in the clerk's office, and no intention to mislead is shown; but an omission or a mistake which tends to mislead will always be fatal, such as using the word "mortgagee" for the word "mortgagor,"⁵⁸ or giving the mortgagor a different first name.⁵⁹

§ 931. Notice should state place of sale.—To be valid, the notice should state the place of sale.⁶⁰ It has been said that a notice, stating that the sale will take place at the city hall, but not stating in what part of the city hall, is good, since by usage the rotunda is the established part of the build-

fore notice of the sale is given, that the notice need not name such assignee, he no longer having any interest in such mortgage. See *White v. McClellan*, 62 Md. 347.

⁵⁴ *Morse v. Byam*, 55 Mich. 594.

⁵⁵ *Judd v. O'Brien*, 21 N. Y. 186. A notice giving correctly the clerk's office and the date of recording the mortgage, though with an error in the number of the book, is a substantial compliance with the statute. The place where the mortgage is recorded will be sufficiently indicated by naming the office and the date of the record, and possibly by mentioning the office alone. It was so

held, where there was no book in the office of so high a number as the one designated. *Judd v. O'Brien*, 21 N. Y. 186, 189. But see *Peaslee v. Ridgway*, 82 Minn. 288, 84 N. W. 1024.

⁵⁶ *Candee v. Burke*, 1 Hun (N. Y.) 546, 4 T. & C. (N. Y.) 143.

⁵⁷ *Brown v. Burney*, 128 Mich. 205, 87 N. W. 221.

⁵⁸ *Abbott v. Banfield*, 43 N. H. 152.

⁵⁹ *Zlotoeczski v. Smith*, 117 Mich. 202, 75 N. W. 470.

⁶⁰ *Burnet v. Denniston*, 5 Johns. Ch. (N. Y.) 35.

ing for such sales; this is also true of a notice of sale at the Merchants' Exchange.⁶¹

§ 932. **Stating amount due in notice.**—As the notice of sale is required to state the amount due at the time of the first publication thereof, it follows that a mortgage given as security for unliquidated damages, cannot be foreclosed by advertisement.⁶² For the convenience of the parties, though not required by statute, the amount claimed to be due at the time of the first publication of the notice,⁶³ should be given in dollars and cents; yet a statement that it is claimed that a particular sum was due at any designated day prior to the notice, will doubtless be sufficient.⁶⁴

If the advertisement of sale contains a false statement, tending to deceive the public as to the amount of the incumbrances, and thereby deters bidders, the sale will be irregular and void.⁶⁵ But this is not true as to a mistake, a correction of which is published with the notice, before it can be presumed to have influenced persons intending to bid; as where, by mistake, the notice of sale stated a prior incumbrance upon the mortgaged property, at twice its actual amount, and a correction thereof was published with the notice two weeks before the sale.⁶⁶

⁶¹ *Hornby v. Cramer*, 12 How. (N. Y.) Pr. 490.

⁶² N. Y. Code Civ. Proc. § 2391; *Ferguson v. Kimball*, 3 Barb. Ch. (N. Y.) 616, 619, except, perhaps, where it contains within itself a measure by which to ascertain the amount of damages; *Jackson v. Turner*, 7 Wend. (N. Y.) 458. See *Mowry v. Sanborn*, 68 N. Y. 153.

⁶³ Stating in the notice the amount due on the day before the first publication, is not fatal. It is surplusage to state that the premises are subject to a lease; and the neglect to state how long the lease

mentioned in a notice has to run will not affect the sale. *Hubbell v. Sibley*, 5 Lans. (N. Y.) 51, aff'd 50 N. Y. 468.

⁶⁴ *Judd v. O'Brien*, 21 N. Y. 186, 189.

⁶⁵ *Burnet v. Denniston*, 5 Johns. Ch. (N. Y.) 35; *Hubbell v. Sibley*, 5 Lans. (N. Y.) 55. See *Klock v. Cronkhite*, 1 Hill (N. Y.) 107; *Jencks v. Alexander*, 11 Paige Ch. (N. Y.) 619.

⁶⁶ *Hubbell v. Sibley*, 5 Lans. (N. Y.) 51, aff'd 50 N. Y. 468. See *Mowry v. Sanborn*, 62 Barb. (N. Y.) 223, rev'd on another point. 65

Nor will the sale be invalidated by a failure to state the exact amount due, where there is no fraudulent intent and no substantial injury results from such failure.⁶⁷ And where the amount alleged to be due is greater than the amount allowed by the terms of the mortgage, in the absence of fraud or any other irregularity, the mortgagor will be required to do equity by paying the amount actually due, or submit to a decree for the resale of the premises;⁶⁸ for the mere fact that a larger amount is claimed in a notice of a sale of lands on foreclosure by advertisement than is actually due does not, where no actual injury or fraudulent purpose is shown, render the sale, and the deed executed in pursuance thereof, void.⁶⁹ But in those cases where the mortgagee becomes the purchaser at the sale of the property for such amount, he is liable to the mortgagor or his assigns for the excess.⁷⁰

The supreme court of Michigan have said, in the case of *Emmons v. Van Zee*,⁷¹ that the insertion of an attorney's fee in the sum for which the land is sold under a foreclosure sale by advertisement does not necessarily render the sale invalid in those cases where the attorney's fee is claimed in good faith. And the New York court of appeals, in the case of *Lewis v. Duane*,⁷² say that the foreclosure by advertisement, for the full amount secured thereby, of a mortgage given to indemnify the mortgagee for existing and future indorsements and advances to pay off judgments against the mortgagor, is not for an amount in excess of that due the

N. Y. 581; *Jencks v. Alexander*, 11 Paige Ch. (N. Y.) 619.

⁶⁷ See *Way v. Dyer*, 176 Mass. 448, 57 N. E. 678. See *ante*, § 539.

⁶⁸ *Huyck v. Graham*, 82 Mich. 353, 46 N. W. 781.

⁶⁹ *Huyck v. Graham*, 82 Mich. 353, 46 N. W. 781; *Bowers v. Hechtman*, 45 Minn. 238, 47 N. W. 792. See also *Long v. Richards*, 170 Mass. 120, 64 Am. St. Rep. 281, 48 N. E. 1083.

⁷⁰ *Fagan v. People's Sav. & L. Assoc.* 55 Minn. 437, 57 N. W. 142. See *ante*, § 853.

As to mortgagee becoming purchaser at his foreclosure by advertisement. See *post*, § 942.

⁷¹ 78 Mich. 171, 43 N. W. 1100.

⁷² 141 N. Y. 302, 36 N. E. 322, 57 N. Y. S. R. 410.

mortgagee, where it is less than the aggregate amount which he has already incurred and will certainly incur in the future on account of outstanding judgments for which he is liable.

§ 933. Stating amount where only part of debt is due.—

Where a sale is made under a power contained in a mortgage, a portion of which is not due at the time of the first publication, the notice must state the sum due and also the amount to become due.⁷³ And where a sale is made subject to future installments, part of which have been paid, without specifying the amount of such installments, the notice will be void,⁷⁴ and a sale under such a notice, for a single installment,⁷⁵ will extinguish the lien of the mortgagee on the entire premises.⁷⁶ In such a case, however, the mortgagee will be entitled to retain out of the proceeds of the sale, the sums due and to become due upon the mortgage, besides the costs and the expenses of the foreclosure.⁷⁷

§ 934. Statement in notice of prior incumbrances.—

It is not necessary to set forth in the notice of sale incumbrances subject to which the sale is to be made. Thus, the unexpired term of a lease, subject to which the premises are to be sold, need not be recited in the notice of sale.⁷⁸ Where unnecessary matters are recited in the notice, they will not render it defective, and the sale thereunder void, unless perhaps, such matters mislead the public, and thereby prevent persons from bidding who might otherwise have become purchasers.⁷⁹ If, however, such matters are inserted in the notice

⁷³ N. Y. Code Civ. Proc. § 2391. See *Jencks v. Alexander*, 11 Paige Ch. (N. Y.) 619, 626.

⁷⁴ *Jencks v. Alexander*, 11 Paige Ch. (N. Y.) 619, 626, N. Y. Code Civ. Proc. § 2391.

⁷⁵ *Minor v. Hill*, 58 Ind. 176, 26 Am. Rep. 71. Compare *Hill v. Minor*, 79 Ind. 48.

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⁷⁶ *Poweshiek Co. v. Dennison*, 36 Iowa, 244, 14 Am. Rep. 524.

⁷⁷ N. Y. Code Civ. Proc. § 2404.

⁷⁸ *Hubbell v. Sibley*, 5 Lans. (N. Y.) 51.

⁷⁹ See also *Pearson v. Gooch*, 69 N. H. 208, 40 Atl. 390.

of sale by mistake, and are corrected before it can be presumed that persons entitled to bid would be influenced thereby, the proceedings will not be prejudiced.⁸⁰

§ 935. Date of sale and signature to notice.—The date of the sale should be correctly given; but where, by mistake, an incorrect date is given, which is obvious on inspection and could not mislead, it will not invalidate the proceedings; as where, by mistake, 1858 was inserted, instead of 1868.⁸¹

The Code requires the notice to be subscribed by the person entitled to execute the power of sale;⁸² where the name of the mortgagee was omitted from the body of a notice of sale, but was signed at the bottom thereof, it was held to be sufficient.⁸³ A notice signed by a duly authorized person as “executor” has been held to contain a sufficient statement of his interest in the mortgage, and how it was acquired;⁸⁴ and where the name of the person entitled to execute the power of sale, distinctly appears in the body of the notice, it may be subscribed by his attorney or agent.⁸⁵

§ 936. Objections to notice of sale.—Where the notice is irregular or defective, objections thereto should be promptly made. It has been said, that after the lapse of fifteen years, a mortgagor, or other party interested, cannot question the regularity of the notice of sale, and that apparent deficiencies will be supplied by intendment.⁸⁶

A sale on foreclosure by advertisement is entirely *ex parte*, and legal objections thereto can be taken whenever the proceed-

⁸⁰ See *ante*, § 932; *Klock v. Cronkhite*, 1 Hill (N. Y.) 107; *Burnet v. Denniston*, 5 Johns. Ch. (N. Y.) 35, 42; *Jencks v. Alexander*, 11 Paige Ch. (N. Y.) 619.

⁸¹ *Mowry v. Sanborn*, 68 N. Y. 153, reversing 7 Hun (N. Y.) 380.

⁸² N. Y. Code Civ. Proc. § 2388.

⁸³ *Candee v. Burke*, 1 Hun (N. Y.) 546, 4 T. & C. (N. Y.) 143.

⁸⁴ *People ex rel. Bridenbecker v. Prescott*, 3 Hun. (N. Y.) 419. See N. Y. Code Civ. Proc. §§ 2388, 2391.

⁸⁵ N. Y. Code Civ. Proc. § 2388.

⁸⁶ *Bergen v. Bennett*, 1 Cai. Cas. (N. Y.) 1, 2 Am. Dec. 281; *Demarest v. Wynkoop*, 3 Johns. Ch. (N. Y.) 129, 8 Am. Dec. 467.

ings are properly brought in question.⁸⁷ Thus, if a tender to redeem was refused by a mortgagee, a sale made by him thereafter would be illegal and void, and a fraud upon subsequent judgment creditors and incumbrancers.⁸⁸

§ 937. Postponement of sale.—The New York Code of Civil Procedure provides,⁸⁹ that “a sale may be postponed from time to time. In that case, a notice of the postponement must be published, as soon as practicable thereafter, in the newspaper in which the original notice was published; and the publication of the original notice, and of each notice of postponement, must be continued, at least once in each week, until the time to which the sale is finally postponed.”⁹⁰

The usual practice is for the party conducting the sale to attend at the time and place appointed for the sale, and to give public notice of the postponement by announcement; and it is believed that this practice should be followed, because a departure from the established practice might be regarded as evidence of bad faith.⁹¹

If a postponement is made at the time and place appointed for the sale, by stating the adjourned time and place to those present, the subsequent notice, to be published until the time of sale, must conform to the adjournment, as thus announced. Thus, where the announcement, made at the time and place first fixed for the sale, was of an adjournment to the tenth of the month, but the printed notice was, by mistake, to the sixteenth, a sale had on the sixteenth was held void.⁹²

⁸⁷ *Hall v. Bartlett*, 9 Barb. (N. Y.) 300; *Burnet v. Denniston*, 5 Johns. Ch. (N. Y.) 35.

⁸⁸ See *Miller v. Finn*, 1 Neb. 254.

⁸⁹ N. Y. Code Civ. Proc. § 2392.

⁹⁰ *Westgate v. Handlin*, 7 How. (N. Y.) Pr. 372; *Sayles v. Smith*, 12 Wend. (N. Y.) 57, 27 Am. Dec. 117. See *Jackson v. Clark*, 7 Johns (N. Y.) 217.

For practice in Massachusetts, see

Marcus v. Collamore, 168 Mass. 56, 46 N. E. 432.

⁹¹ Circumstances tending to show fraud in the adjournment of a sale, previously advertised on proceedings which were abandoned, have been held not to amount to fraud in the sale. See *Lect v. McMaster*, 51 Barb. (N. Y.) 236.

⁹² *Miller v. Hull*, 4 Den. (N. Y.) 104.

Where a mortgagee published a notice under his advertisement of sale, that the sale was to be adjourned, but neglected to post a notice of such adjournment, the court held that he was bound by his adjournment, and that his sale made on the original notice, disregarding the adjournment, was irregular and void.⁹³ It has been held that where the notice of sale was for Sunday, the mortgagee might, before the day of sale, postpone it to another day and make a valid sale under the notice.⁹⁴

The supreme judicial court of Massachusetts, in the case of *Clark v. Simmons*,⁹⁵ say that in those cases where, at an auction sale under a power contained in a mortgage, the only person present who will buy at all will offer only a small part of the well-known value of the property, the conditions which are impliedly essential to the execution of the power are wanting, and it is the duty of the mortgagee either to abandon his attempt to sell, or to adjourn the sale until he can obtain the presence of bidders. But in those cases where the property has been properly advertised, it is not the duty of the person conducting the sale under the power to postpone it to another day, where there are a dozen persons present and several bids are made, and the sale realizes more than the amount of the mortgage and the expenses of sale.⁹⁶

§ 938. Time and place of sale.—The New York Code of Civil Procedure provides,⁹⁷ that the sale must be made “at public auction, in the daytime, on a day other than Sunday or a public holiday,⁹⁸ in the county in which the mortgaged

⁹³ *Jackson v. Clark*, 7 Johns. (N. Y.) 217.

⁹⁴ *Westgate v. Handlin*, 7 How. (N. Y.) Pr. 372.

⁹⁵ 150 Mass. 357, 23 N. E. 108.

⁹⁶ *Stevenson v. Hano*, 148 Mass. 616, 20 N. E. 200. See also *Shaw v. Smith, as assignee, etc.* 107 Md. 523, 69 Atl. 116.

⁹⁷ N. Y. Code Civ. Proc. § 2393. For Mississippi rule as to time

and place of sale see *Melsheimer v. McNight*, 92 Miss. 386, 46 So. 827; *Davis v. O'Connell*, 92 Miss. 348, 47 So. 672.

⁹⁸ See *Mutual Fire Ins. Co. v. Barker*, 17 App. D. C. 205.

Selling on Sunday is not unlawful, for selling land under a statutory foreclosure is not a judicial proceeding. *Sayles v. Smith*, 12 Wend. (N. Y.) 57, 27 Am. Dec.

property, or a part thereof, is situated;⁹⁹ except that, where the mortgage is to the people of the state, the sale may be made at the Capitol." The mortgagee's deed will not convey a title, unless the sale was held at public auction pursuant to the statutory notice, even though the mortgage may contain a power of sale, expressly authorizing the mortgagee, on default, to sell the premises at private sale.¹ Where the instrument itself fixes a place of sale, the sale must be made at that place.²

And a sale of property under a power in a deed of trust requiring the sale to be made at the county-seat of a designated county is void where it is made at a place which never was such county-seat.³ The place of sale is within the sound discretion of the trustee in a trust deed, where the deed contains no stipulation in respect thereto.⁴ Such discretion, however, should be exercised fairly and prudently.⁵

§ 939. By whom sale to be conducted.—A sale is usually conducted by the mortgagee, but if it is made to appear likely to the court that he will exercise his power in a harsh,

117. Where the day first set is Sunday, a postponement from that day will be regular. *Westgate v. Handlin*, 7 How. (N. Y.) Pr. 372.

⁹⁹ See *Kerr v. Galloway*, 94 Tex. 641, 64 S. W. 858. See also *Beitel v. Dobbin*, 44 S. W. 299 (Tex.); *Chandler v. Peters*, 44 S. W. 867 (Tex.)

¹ *Lawrence v. Farmers' Loan and Trust Co.* 13 N. Y. 200.

² *Fry v. Old Dominion Building & Loan Ass'c. of Richmond, Va.* 48 W. Va. 61, 35 S. E. 842.

The same applies to the time of sale. *Garrett v. Crawford*, 128 Ga. 519, 119 Am. St. Rep. 398, 57 S. E. 792.

³ *Durrell v. Farwell* (Tex. Civ.

App.) 27 S. W. 795, aff'd in part and rev'd in part in 30 S. W. 539, and rev'd in 31 S. W. 185.

⁴ A sale under a trust deed for \$12,000, not prescribing the place of sale, of land claimed to be worth \$25,000, should be held upon the premises, where the debtor requests it and claims that it is not necessary to sell the whole, and that the appearance and situation of the property will increase the prospects of a good sale when it is made in view of the bidders. *Morriss v. Virginia State Ins. Co.* 90 Va. 370, 18 S. E. 843.

⁵ *Morriss v. Virginia State Ins. Co.* 90 Va. 370, 18 S. E. 843.

oppressive, or improper manner, the court will associate a referee with him to see that the sale is properly conducted, and that only so much of the mortgaged premises is sold as will be sufficient to satisfy the mortgage debt.⁶

Where the sale is conducted by the mortgagee, he is regarded, in equity, as a trustee, and is bound to conduct the proceedings in a fair and just manner, and in good faith,⁷ and is governed by substantially the same rules as control a sale made by a referee in a foreclosure by action.⁸

§ 940. *Sale in parcels.*—The New York Code of Civil Procedure requires,⁹ that “if the property consists of two or more distinct farms, tracts, or lots, they must be sold separately; and as many only of the distinct farms, tracts, or lots, shall be sold, as it is necessary to sell, in order to satisfy the amount due at the time of the sale, and the costs and expenses allowed by law. But where two or more buildings are situated upon the same city lot, and access to one is obtained through the other, they must be sold together.” In some states the parties may waive the provisions of the statute requiring sale in parcels.¹⁰

If the land consists of distinct farms, tracts, or lots, and they are sold together, the sale will be voidable,¹¹ at least, if not absolutely void;¹² but where the premises do not consist

⁶ *VanBergen v. Demarest*, 4 Johns. Ch. (N. Y.) 37.

⁷ *Soule v. Ludlow*, 3 Hun (N. Y.) 503, 6 T. & C. (N. Y.) 24. See *Ellsworth v. Lockwood*, 42 N. Y. 89.

⁸ See *ante*, chap. xxv.; also *Soule v. Ludlow*, 3 Hun (N. Y.) 503, 6 T. & C. (N. Y.) 24.

⁹ N. Y. Code Civ. Proc. § 2393.

¹⁰ *Brown v. British & American Mortgage Co.* 86 Miss. 388, 38 So. 312.

¹¹ *Phelps v. Western Realty Co.* 89 Minn. 319, 94 N. W. 1085.

The sale will be voidable where it was the result of fraud, or where prejudice resulted therefrom to the mortgagor or owner of the equity of redemption. *Willard v. Finnegan*, 42 Minn. 476, 44 N. W. 985, 8 L.R.A. 50.

¹² *Wells v. Wells*, 47 Barb. (N. Y.) 416.

of distinct farms, parcels, or lots, they need not be sold separately.¹³ It is believed that where lands are mortgaged as one undivided lot, or parcel, and are subsequently subdivided, the mortgagee is not bound to sell them in parcels.¹⁴ It has been held that land may be sold in parcels to separate purchasers at one sale, under a power in the mortgage, if the sale is made in such a manner as to obtain the most money for the land.¹⁵

It seems, however, that a court of equity can give relief against a sale of the whole mortgaged property in one parcel, even where mortgaged as one tract, if a party standing in the position of a junior mortgagee, or as owner of the property, requests a sale in parcels, and offers in good faith to bid the amount of the mortgage, with the costs and expenses of the sale.¹⁶ Where the parcels are so situated that they can be conveniently sold and conveyed separately, the general rule governing a sale in parcels under a decree and order of sale,¹⁷ will govern a sale in a foreclosure by advertisement.

While a mortgagee is not bound by the notice of sale to sell the mortgaged premises in parcels in the absence of a request as above stated, unless they are described in parcels in the mortgage,¹⁸ yet he may do so, where the premises are so situated that he can sell them to better advantage;¹⁹ and he may also reserve certain rights for the benefit of the owner of

¹³ *Anderson v. Austin*, 34 Barb. (N. Y.) 319; *Bunce v. Reed*, 16 Barb. (N. Y.) 347, 350; *Holden v. Gilbert*, 7 Paige Ch. (N. Y.) 211.

¹⁴ *Lamerson v. Marvin*, 8 Barb. (N. Y.) 9; followed in *Ellsworth v. Lockwood*, 9 Hun (N. Y.) 548; *Hubbell v. Sibley*, 5 Lans. (N. Y.) 51. See *Lazarus v. Caesar*, 157 Mo. 199, 57 S. W. 751. See *ante*, § 574, 577 and chap. xxiii.

¹⁵ *Holmes v. Turners Falls Lumber Co.* 150 Mass. 535, 23 N. E. 305, 6 L.R.A. 283.

¹⁶ *Ellsworth v. Lockwood*, 42 N. Y. 89, aff'd 9 Hun (N. Y.) 548.

¹⁷ See *ante*, chap. xxiii.

¹⁸ *Sherman v. Willett*, 42 N. Y. 146, 150; *Griswold v. Fowler*, 24 Barb. (N. Y.) 135; *Lamerson v. Marvin*, 8 Barb. (N. Y.) 9.

¹⁹ *Sherman v. Willett*, 42 N. Y. 146, 151. See also *Markwell v. Markwell*, 157 Mo. 326, 57 S. W. 1078.

the equity of redemption, where the property is amply sufficient to pay the mortgage debt.²⁰

Where a sale is made by a trustee under a trust deed authorizing him to "sell and dispose of said premises," he has a discretion to sell the land entire or in parcels; and his failure to advertise the sale as in parcels will not make it invalid.²¹

§ 941. **Terms of sale.**—The Code does not require that the published notice shall contain the terms of sale,²² while it is the practice to conform the terms of a sale to those made under decrees of foreclosure, by stating in writing the conditions upon which the purchaser is to pay for and receive the title, yet the mortgagor, or those claiming under him, cannot object to the sale on the ground that the terms thereof were not given in the notice of foreclosure, nor in the affidavits of sale, and that the owner of the equity of redemption had no knowledge or notice of the terms of sale, and had never ratified them.²³

In a sale on foreclosure by advertisement under a power in the mortgage, the payment of the purchase money is a matter between the mortgagee and the purchaser; the mortgagor having no other interest than to obtain the credit and benefit of the amount bid.²⁴ And where he gets that, neither he nor any other person who was not a beneficiary can complain because the payment was not made in cash.²⁵

The sale may be made for cash²⁶ or upon time, as to a part or the whole of the amount, in the discretion of the mortgagee, and where time is given for the payment of the whole,

²⁰ *Sherman v. Willett*, 42 N. Y. 146.

²¹ *Loveland v. Clark*, 11 Colo. 265, 18 Pac. 544.

²² See also *Nichols v. Hoxie, as trustee*, 33 R. I. 77, 80 Atl. 186.

²³ *Story v. Hamilton*, 20 Hun (N. Y.) 133, aff'd 86 N. Y. 428.

²⁴ *Mewburn v. Bass*, 82 Ala. 622, 2 So. 520.

²⁵ *Jones v. Hagler*, 95 Ala. 529, 10 So. 345. See also *Marlin v. Sawyer*, 57 S. W. 416 (Tenn.)

²⁶ Payment of about 7 per cent of bid at time of sale and the balance several days later when deed was made is sale for cash. *Charles Green Real Estate Co. v. St. Louis Mutual House Building Co. No. 3*, 196 Mo. 358, 93 S. W. 1111.

or a portion of the purchase money, the mortgagee may determine what security he will require.²⁷ Where the sale is made for cash, a reasonable deposit may be required, although the advertisement may not specify such terms, nor state that the terms would be made known on the day of the sale.²⁸ Where a sale is made for cash, payment may be made by a check;²⁹ or, by discharging a debt due from the mortgagee to the purchaser.³⁰

Upon a sale under the foreclosure of a second mortgage by advertisement, it is proper for the mortgagee to make the sale subject to the prior mortgage;³¹ or he may advertise and sell the property free and clear of all incumbrances, if the prior mortgage is due, and pay it off out of the proceeds of the sale.

§ 942. Mortgagee may become purchaser.—The New York Code provides,³² that “the mortgagee, or his assignee, or the legal representative of either, may, fairly and in good faith, purchase the mortgaged property, or any part thereof, at the sale.”³³ The sale may be made by the mortgagee, or the owner of the mortgage, and he may himself become the purchaser and make the affidavit which stands in the place of a deed.³⁴

It has been held, that even without the above statutory provision, the mortgagee, or his assignee, or the legal repre-

²⁷ *Cox v. Wheeler*, 7 Paige Ch. (N. Y.) 248, 251; *Whitfield v. Rid-dle*, 78 Ala. 99.

²⁸ *Pope v. Burrage*, 115 Mass. 282; *Model House Assoc. v. Bos-ton*, 114 Mass. 133; *Gooddale v. Wheeler*, 11 N. H. 424.

²⁹ *McConneaughey v. Bogardus*, 106 Ill. 321.

³⁰ *Cooper v. Hornsby*, 71 Ala. 62; *Tartt v. Clayton*, 109 Ill. 579.

³¹ *Story v. Hamilton*, 86 N. Y. 428, aff'd 20 Hun (N. Y.) 133.

³² N. Y. Code Civ. Proc. § 2394.

³³ *Mowry v. Sanborn*, 68 N. Y. 160; *Hollingsworth v. Spalding*, 54 N. Y. 636; *Hubbell v. Sibley*, 50 N. Y. 468, aff'd 5 Lans. (N. Y.) 51; *Jackson v. Colden*, 4 Cow. (N. Y.) 266; *Valentine v. Belden*, 20 Hun (N. Y.) 537; *Cox v. Wheeler*, 7 Paige Ch. (N. Y.) 248. See *ante*, § 320.

³⁴ *Hubbell v. Sibley*, 5 Lans. (N. Y.) 51, aff'd 50 N. Y. 468.

sentative of either, would have a right to purchase the premises;³⁵ and may come into equity to have his sale confirmed and his title perfected, and in his bill may offer to have the land resold at the option of the mortgagor;³⁶ such bill will not be dismissed for want of equity.³⁷ The better opinion, however, seems to be that a court of equity will not allow the person holding a mortgage containing a power of sale to become the purchaser at a sale made thereunder, unless he is expressly authorized so to purchase, by the terms of the mortgage.³⁸

But where the mortgage contains a provision allowing the mortgagee to become the purchaser, he may make the deed in his own name, directly to himself.³⁹ Such a purchase, made by the mortgagee for his sole benefit, is valid, and will effectually foreclose the entire equity of redemption, if he faithfully discharges, in all respects, the duties imposed upon him as donee of the power.⁴⁰

If a mortgagee purchases on a sale for an installment due, his mortgage will be merged; but it seems that if a third person purchases, the mortgagor, on being compelled by suit on the bond to pay the balance of the debt, is entitled to an as-

³⁵ *Elliott v. Wood*, 53 Barb. (N. Y.) 285, aff'd 45 N. Y. 71; *Lewis v. Duane*, 69 Hun (N. Y.) 28, 23 N. Y. Supp. 433, 52 N. Y. S. R. 818.

As to purchase by mortgagee on sale in foreclosure by action, see full discussion, *ante*, § 610, *et seq.*

³⁶ *Orr v. Blackwell*, 93 Ala. 212, 8 So. 413.

³⁷ *McHan v. Ordway*, 82 Ala. 463, 2 So. 276.

³⁸ *Hall v. Bliss*, 118 Mass. 554, 558, 19 Am. Rep. 476, 480; *Dyer v. Shurtleff*, 112 Mass. 165, 17 Am. Rep. 77; *Downes v. Grazebrook*, 3 Meriv. 200. But see *Dunn v. Oettinger Bros.* 148 N. C. 276, 61 S. E.

679; *Rich v. Morisey, as ex'r, etc.* 149 N. C. 37, 62 S. E. 762; *Payton v. McPhaul*, 128 Ga. 510, 58 S. E. 50; *Stark v. Love*, 128 Mo. App. 24, 106 S. W. 87.

³⁹ *Wilson v. Troup*, 7 Johns. Ch. (N. Y.) 25, 2 Cow. (N. Y.) 195, 14 Am. Dec. 458; *Hall v. Bliss*, 118 Mass. 554, 558, 19 Am. Rep. 476, 480; *Dexter v. Shepard*, 117 Mass. 480.

⁴⁰ See *Wilson v. Troup*, 7 Johns. Ch. (N. Y.) 25, 2 Cow. (N. Y.) 195, 14 Am. Dec. 458; *Hall v. Bliss*, 118 Mass. 554, 558, 19 Am. Rep. 476, 480; *Dexter v. Shepard*, 117 Mass. 480.

signment of the mortgage to enable him to secure repayment of the debt out of the land.⁴¹

The payment of a mortgage extinguishes the power of sale under it; if a statutory foreclosure thereof is afterwards made for the benefit of an assignee of the mortgage, and he bids in the property, he will acquire no title, because one who has no power to sell is not a purchaser in good faith at his own sale.⁴² Whether any person can acquire a good title at such a sale, is questionable.⁴³

§ 943. **Setting sale aside.**—The proceedings in a foreclosure by advertisement may be set aside for fraud,⁴⁴ mistake, unfairness, or bad faith, under the same circumstances and in the same cases, in which a sale would be set aside in a foreclosure by an equitable action.⁴⁵ Any person, whose interests are injuriously affected by the sale, may apply to have it set aside; but on such an application, a *bona fide* purchaser will be protected.⁴⁶ To entitle a person to protection by the court as a *bona fide* purchaser, it must be made clearly to appear that the purchase was made in good faith, and that the consideration was paid, before notice of defects in the title, or of irregularities in the sale, was received.⁴⁷

On an application to have a sale set aside as illegal and fraudulent, the purchaser at the sale, as well as all persons claiming rights under him, must be made parties to the pro-

⁴¹ *Cox v. Wheeler*, 7 Paige Ch. (N. Y.) 248.

⁴² *Warner v. Blakeman*, 4 Abb. App. Dec. (N. Y.) 530, 4 Keyes (N. Y.) 487, aff'g 36 Barb. (N. Y.) 501; *Cameron v. Irwin*, 5 Hill (N. Y.) 272.

⁴³ *Warner v. Blakeman*, 4 Abb. App. Dec. (N. Y.) 530, 4 Keyes (N. Y.) 487.

⁴⁴ *Herring v. Sutting*, 86 Miss. 283, 38 So. 235. See *Davis v. Keen*, 142 N. C. 496, 55 S. E. 359.

⁴⁵ *Soule v. Ludlow*, 3 Hun (N. Y.) 503, 6 T. & C. (N. Y.) 24; *Hubbell v. Sibley*, 5 Lans. (N. Y.) 51; *Clevinger v. Ross*, 109 Ill. 349. See *Carr v. Graham*, 128 Ga. 622, 57 S. E. 875. See *ante*, chap. xvi.

⁴⁶ *Warner v. Blakeman*, 36 Barb. (N. Y.) 501, aff'g 4 Keyes (N. Y.) 487.

⁴⁷ *Grover v. Hale*, 107 Ill. 638; *Redden v. Miller*, 95 Ill. 336; *Brown v. Welch*, 18 Ill. 343, 68 Am. Dec. 549.

ceeding.⁴⁸ And where a sale is set aside on such application, it will have the effect of re-instating and preserving unimpaired, the lien of the mortgage.⁴⁹ In such a case, the purchaser will stand as the assignee of the mortgagee, and will be vested with all of his rights.⁵⁰

§ 944. Grounds for setting sale aside.—Mere inadequacy of price is not of itself a ground for setting aside a sale, made pursuant to a power contained in a mortgage,⁵¹ unless the inadequacy is so gross as to amount to evidence of fraud against the debtor's rights.⁵² An application for setting aside a sale, made pursuant to a power, is always addressed to the sound discretion of the court, the same as an application to set aside a sale made pursuant to a decree in a foreclosure by action;⁵³ and the application will be denied, if the party applying has been guilty of laches.⁵⁴

⁴⁸ See *Candee v. Burke*, 1 Hun (N. Y.) 546, 4 T. & C. (N. Y.) 143; *Marvel v. Cobb*, 200 Mass. 293, 86 N. E. 360.

⁴⁹ *Stackpole v. Robbins*, 47 Barb. (N. Y.) 212; *Lash v. McCormick*, 17 Minn. 407.

⁵⁰ *Jackson v. Bowen*, 7 Cow. (N. Y.) 13; *Vroom v. Ditmas*, 4 Paige Ch. (N. Y.) 526.

⁵¹ *Monroe Bros. & Co. v. Fuchter & Kern*, 121 N. C. 101, 28 S. E. 63; *Markwell v. Markwell*, 157 Mo. 326, 57 S. W. 1078; *Keith v. Browning*, 139 Mo. 190, 40 S. W. 764; *Stevenson v. Dana*, 166 Mass. 163, 44 N. E. 128; *Washburn v. Williams*, 10 Colo. App. 153, 50 Pac. 223; *Lathrop v. Tracy*, 24 Colo. 382, 65 Am. St. Rep. 229, 51 Pac. 486; *Weyburn v. Watkins*, 90 Miss. 728, 44 So. 145; *Stockwell v. Barnum*, 7 Cal. App. 413, 43 Pac. 1053; *Grove v. Great Northern Loan Co.* 17 N. D. 352, 138 Am. St. Rep. 707, 116

N. W. 345; *Turansky v. Weinberg*, 211 Mass. 324, 97 N. E. 755. See *ante*, § 640, also *Laclede Bank v. Keeler*, 109 Ill. 385; *Cleaver v. Green*, 107 Ill. 67; *Atkinson v. Washington & Jefferson College*, 54 W. Va. 32, 46 S. E. 253.

⁵² *Magnusson v. Williams*, 111 Ill. 450; *Beacon Hill Land Co. v. Bowen, as adm'r, etc.* 33 R. I. 404, 82 Atl. 81; *Shaw v. Smith, as assignee, etc.* 107 Md. 523, 69 Atl. 116; *Davis v. Keen*, 142 N. C. 496, 55 S. E. 359; *Daggett Hardware Co. v. Brownlee*, 186 Mo. 621, 85 S. W. 545. See *Summers v. Crofts*, 145 Ky. 456, 140 S. W. 684. See also *Fenton v. Bell*, 53 S. W. 984 (Tenn.)

⁵³ See *ante*, § 619.

⁵⁴ *Depew v. Depew*, 46 How. (N. Y.) Pr. 441; *Northwestern Mortgage Trust Co. v. Bradley*, 9 S. D. 495, 70 N. W. 648; *Quirk v. Liebert*, 12 App. D. C. 394. See *Marvey v.*

It is no ground for setting a sale aside that the mortgagee refused, at the request of the owner of the premises, who had assumed the payment of the mortgage, to sell a part of the tract first, if such part did not correspond to any prior known division, and no description thereof was suggested at the time by which a conveyance could be made.⁵⁵

If a mortgagee sells the property after the debt has been satisfied, he thereby offends the equitable rights of the mortgagor which a court of equity will intervene to protect, by vacating the sale.⁵⁶ In *Curtis v. Moore*,⁵⁷ the court say, "if the debt secured by the trust was fully paid before the foreclosure, the trustee's deed conveyed no title, for the power to sell was extinguished as between the mortgagor and mortgagee. But as to the purchaser at the trustee's sale, in good faith and without notice, the deed passed a good title."

The supreme court of Michigan in the case of *Dohm v. Haskin*,⁵⁸ say that where notice given by a mortgagee at a sale by advertisement under a mortgage upon his co-tenant's interest in a will, that he should foreclose a chattel mortgage upon such interest in the machinery against any purchaser, is sufficient to invalidate the sale, although the co-tenant knew that it was for the same debt as the real-estate mortgage. And any unfairness and want of good faith on the part of a mortgagee who purchases the mortgaged property at such a sale

Cobb, 200 Mass. 293, 86 N. E. 360; *Southey v. McIntire*, 7 App. D. C. 447; *Higbee v. Daeley*, 15 N. D. 339, 109 N. W. 318; *Clary v. Schaack*, 253 Ill. 471, 97 N. E. 1070. See also *Baker v. Cunningham*, 162 Mo. 134, 85 Am. St. Rep. 490, 62 S. W. 445; *Woodruff v. Adair*, 131 Ala. 530, 32 So. 515; *Mason v. American Mortgage Co. of Edinburgh, Scotland*, 124 Ala. 347, 26 So. 900; *Pitts v. American Freehold Land Mortgage Co. of London, Limited*, 157 Ala. 56, 47 So. 242.

⁵⁵ *Ellsworth v. Lockwood*, 9 Hun (N. Y.) 547. It was held in New York, prior to the revised statutes, that the omission to record a power of sale before a conveyance did not vitiate the sale. *Jackson v. Colden*, 4 Cow. (N. Y.) 266; *Wilson v. Troup*, 2 Cow. (N. Y.) 195, 14 Am. Dec. 458.

⁵⁶ *Liddell & Co. v. Carson*, 122 Ala. 518, 26 So. 133.

⁵⁷ 162 Mo. 442, 63 S. W. 80.

⁵⁸ 88 Mich. 144, 50 N. W. 108.

will invalidate the sale, although he keeps within the letter of the statute.⁵⁹

A sale on foreclosure by advertisement will not be set aside because of the non-observance of a custom among auctioneers to place notices upon doors or windows of houses for sale, stating the time and place of sale.⁶⁰ Neither will a sale made under a power in the mortgage, in the absence of the mortgagee, without written authority to the auctioneer, who became purchaser thereof, be set aside on these facts alone after nine years.⁶¹ And it has been held the fact that a notice of a trustee's sale under a deed of trust, which states specifically the locality of the property as to the section and subdivision thereof and its general metes and bounds, excepting portions thereof in such a way as not to show how much is actually to be sold, is not ground for setting aside the deed under the sale, unless resultant prejudice to the debtor therefrom is affirmatively shown.⁶²

The supreme judicial court of Massachusetts, in the case of *Stevenson v. Hano*,⁶³ hold that a sale under a power in a mortgage will not be set aside because of the failure to adjourn it on account of the small attendance, where it had been properly advertised and there were about a dozen persons present, and several bids made, and the sale realized more than the amount of the mortgage and expenses.⁶⁴ But the supreme court of Maryland, in the case of *Chilton v. Brooks*,⁶⁵ say that a sale of land under a power in a mortgage of the property, for \$1,000 or more below the market value, will be set aside where it was purchased by the mort-

⁵⁹ *Newman v. Ogden*, 82 Wis. 53, 51 N. W. 1091.

⁶⁰ *Chilton v. Brooks*, 69 Md. 584, 16 Atl. 273. See *ante*, 630.

⁶¹ *Welsh v. Coley*, 82 Ala. 363, 2 So. 733.

⁶² *Loveland v. Clark*, 11 Colo. 265, 18 Pac. 544.

⁶³ 148 Mass. 616, 20 N. E. 200.

⁶⁴ As to duty to postpone sale in foreclosure by advertisement for want of sufficient bidders. See *ante*, § 937.

⁶⁵ 69 Md. 584, 16 Atl. 273.

gagee, and the sale was made on the day when the weather was so inclement as to prevent purchasers from attending.⁶⁶

The supreme court of Arkansas, in the case of *Matthews v. Daniels*,⁶⁷ say that a sale under a power in a mortgage cannot be set aside merely because the mortgagee becomes the purchaser thereat, in the absence of any showing that it is unfairly or unfaithfully conducted.⁶⁸

§ 945. Enjoining sale.—Where it is inequitable that the mortgagee should sell the property under the power of sale contained in the mortgage, an injunction restraining such sale will be granted on the application of the mortgagor,⁶⁹ or of any other person interested in preventing the sale.

Thus, if the mortgagee claims a larger amount in his notice than is actually due,⁷⁰ and the party applying for the injunction offers to pay the amount really due,⁷¹ or if the mortgage is usurious,⁷² or if the amount due can be determined only by a judicial finding, an injunction restraining the sale may be properly granted.⁷³

Where the mortgage is valid and due, and the mortgagee is conducting the foreclosure according to statute, the sale

⁶⁶ See also *Mutual Fire Ins. Co. v. Barker*, 17 App. D. C. 205.

⁶⁷ 21 S. W. 469.

⁶⁸ See *ante*, § 610.

⁶⁹ Where there is a defence to the mortgage, the mortgagor may protect himself either by commencing an action to restrain the sale, or by attending the sale and giving notice of the facts.

⁷⁰ *Cole v. Savage*, Clarke Ch. (N. Y.) 482. Thus, where less than the face of the mortgage was advanced when it was given, and the mortgagee advertised under the power, claiming the whole face of the mortgage as being due, it was

held, that the mortgagor's grantee might maintain a bill in equity to restrain the sale and to ascertain the amount actually due. *Cole v. Savage*, Clarke Ch. (N. Y.) 482.

⁷¹ *Vechte v. Brownell*, 8 Paige Ch. (N. Y.) 212.

⁷² *Hyland v. Stafford*, 10 Barb. (N. Y.) 558; *Cole v. Savage*, Clarke Ch. (N. Y.) 482; *Burnet v. Denniston*, 5 Johns. Ch. (N. Y.) 35, 41.

⁷³ *Gooch v. Vaughan*, 92 N. C. 610; *Purnell v. Vaughan*, 77 N. C. 268; *Capelhart v. Biggs*, 77 N. C. 261; *Kornegay v. Spicer*, 76 N. C. 95.

will not be enjoined.⁷⁴ The mortgagee is entitled to foreclose at any time after default, and the simple fact that the time selected for the sale is at a season of the year when property will not sell to the best advantage, or when the sale is inconvenient to subsequent incumbrancers, is not a ground for interfering with the sale.⁷⁵

Neither will the sale be delayed to enable several owners of the equity of redemption, or junior incumbrancers, to settle among themselves the proportion which each is to pay towards the discharge of the mortgage, unless, perhaps, a sufficient sum is paid into court to secure the mortgagee from loss; in which case, it seems that a reasonable time will be allowed.⁷⁶ Where the amount due on a mortgage has been judicially determined, an injunction to stay the sale will not be granted to enable an appeal to be taken, if the rights of the parties can be otherwise fully protected.⁷⁷

§ 946. Damages for wrongful injunction.—Where a mortgagee has been wrongfully enjoined from proceeding to sell the mortgaged premises, and is entitled to damages in consequence, such damages will consist of his necessary counsel fees for services rendered in dissolving the mortgagor's injunction, and also on the reference,⁷⁸ besides the expenses incurred,⁷⁹ and his taxable costs.⁸⁰

⁷⁴ *Jones v. Matthie*, 11 Jur. 504; *Whitworth v. Rhodes*, 20 L. J. N. S. (Ch.) 105.

⁷⁵ *Bedell v. McClellan*, 11 How. (N. Y.) Pr. 172.

⁷⁶ *Brinkerhoff v. Lansing*, 4 Johns. Ch. (N. Y.) 65, 8 Am. Dec. 538.

⁷⁷ *Outtrín v. Graves*, 1 Barb. Ch. (N. Y.) 49.

⁷⁸ *Lee v. Homer*, 37 Hun (N. Y.) 634. See *Rose v. Post*, 56 N. Y. 603; *Disbrow v. Gracia*, 52 N. Y. 654; *Hovey v. Rubber Tip Pencil Co.* 50 N. Y. 335; *Andrews v. Glen-*

ville Woolen Co. 50 N. Y. 282; *Aldrich v. Reynolds*, 1 Barb. Ch. (N. Y.) 613; *Edwards v. Bodine*, 11 Paige Ch. (N. Y.) 223.

⁷⁹ *Lawton v. Green*, 64 N. Y. 326, 331; *Aldrich v. Reynolds*, 1 Barb. Ch. (N. Y.) 613.

⁸⁰ *Aldrich v. Reynolds*, 1 Barb. Ch. (N. Y.) 613. See *Rose v. Post*, 56 N. Y. 603; *Hovey v. Rubber Tip Pencil Co.* 50 N. Y. 335; *Andrews v. Glenville Woolen Co.* 50 N. Y. 282; *Edwards v. Bodine*, 11 Paige Ch. (N. Y.) 223.

§ 947. **Lands situated in another state.**—The statutes of New York, regulating the foreclosure of mortgages by advertisement, do not apply to mortgages on real estate situated out of the state;⁸¹ consequently, the courts of New York have no authority to enjoin a mortgagee of lands which are in another state, from selling such lands at public sale within the state, according to the terms of the mortgage security, upon the mere allegation that such power is void, particularly where no contrary statute of the state or territory where the lands are situated is alleged, and the invalidity of the power is not made apparent.⁸²

Thus, where a mortgage, executed by a mining corporation upon lands in Colorado, authorized a sale, after a certain specified notice, in the city of New York, the court held, in an action to restrain a sale thus authorized, that, in the absence of any statutory regulation, the parties had the power to agree upon the manner of sale; that the statute of New York, in reference to the sale of mortgaged premises, had reference only to real estate in that state; and that there was no ground for equitable relief, as there was no proof that the sale, as provided for in the mortgage, was in conflict with the laws of Colorado.⁸³

§ 948. **Effect of sale by advertisement.**—The New York code⁸⁴ provides, that “a sale, made and conducted as prescribed by the statute, to a purchaser in good faith, is equivalent to a sale, pursuant to judgment in an action to foreclose the mortgage, so far only as to be an entire bar of all claim or equity of redemption, upon, or with respect to, the property sold, of each of the following persons: (1) the mortgagor, his heir, devisee, executor or administrator; (2) each person claiming under any of them, by virtue of a title or of a lien by judgment or decree, subsequent to the mortgage, upon whom

⁸¹ *Elliott v. Wood*, 45 N. Y. 71.

⁸³ *Carpenter v. Blackhawk Gold*

⁸² *Central Gold Mining Co. v. Mining Co.* 65 N. Y. 43.

Platt, 3 Daly (N. Y.) 263.

⁸⁴ N. Y. Code Civ. Proc. § 2395.

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the notice of sale was served, as prescribed by the statute;⁸⁵ (3) each person so claiming, whose assignment, mortgage, or other conveyance was not duly recorded in the proper book for recording the same in the county, or whose judgment or decree was not duly docketed in the county clerk's office, at the time of the first publication of the notice of sale; and the executor, administrator, or assignee of such a person; (4) every other person, claiming under a statutory lien or incumbrance, created subsequent to the mortgage, attaching to the title or interest of any person, designated in either of the foregoing subdivisions; (5) the wife or widow of the mortgagor or of a subsequent grantee, upon whom notice of the sale was served as prescribed by statute, where the lien of the mortgage was superior to her contingent or vested right of dower, or her estate in dower."⁸⁶

§ 949. Sale firm and binding on all parties.—The title of a purchaser in good faith at such a sale, is the same as the title acquired by a purchaser at a sale made under a decree of foreclosure in an equitable action.⁸⁷ Where such

⁸⁵ A judgment which is docketed after the first publication of the notice, and before the sale, will not be barred by the foreclosure, if the creditor is not served with the notice, and the holder thereof may redeem from the mortgage. *Groff v. Morehouse*, 51 N. Y. 503. In an early case, it appeared that a party, having a judgment subsequent to a mortgage, sold the premises under it, and acquired a right to a deed prior to the sale under the mortgage, though he did not receive his deed until after the sale; it was held that the deed took effect from the time when it might have been demanded, and that the judgment creditor's title was cut off by the statutory foreclosure. *Klock v.*

Cronkhite, 1 Hill (N. Y.) 107, and see *Post v. Arnot*, 2 Den. (N. Y.) 344.

⁸⁶ N. Y. Code Civ. Proc. § 2395. Foreclosure by advertisement under a power of sale contained in a purchase money mortgage, not executed by the mortgagor's wife, will bar her right of dower. *Brackett v. Baum*, 50 N. Y. 8. Compare N. Y. Code Civ. Proc. §§ 2388, 2395.

⁸⁷ N. Y. Code Civ. Proc. § 2395. See *Decker v. Boice*, 19 Hun (N. Y.) 152, aff'd 83 N. Y. 215; *Jackson v. Henry*, 10 Johns. (N. Y.) 185, 6 Am. Dec. 328; *Doolittle v. Lewis*, 7 Johns. Ch. (N. Y.) 45, 50, 11 Am. Dec. 389; *Slee v. Manhattan Ins. Co.* 1 Paige Ch. (N. Y.) 48, 69; *Otis v. McMillan*, 70 Ala. 46.

a sale is made strictly as prescribed by statute, all questions which would have been determinable in an equitable action to foreclose a mortgage, will be settled by such sale.⁸⁸

As the statute has no saving clause for such persons as may be under a disability at the time, it is believed that the courts can make no exceptions in their favor on the ground of any inherent equity applicable to the case. Thus, infants not being excepted from the operation of the statute, the courts can make no exception in their favor, and their equity of redemption will be effectually and absolutely barred by a regular sale under the power.⁸⁹

The theory of the statute is that all foreclosures should be final, where they are free from fraud and gross irregularity.⁹⁰ But the requirements of the statute must be strictly complied with, in order to cut off the rights of the mortgagor and of subsequent grantees or incumbrancers; the object of the statute being to relieve interested parties from the expenses of an action, and to enable persons, not learned in the law, to conduct foreclosure proceedings, it follows that the construction placed upon the statute should be liberal and not technical.⁹¹

And the court of appeals of New York, in the case of *Lewis v. Duane*,⁹² hold that a mortgagor with whose knowledge and approval the mortgagee makes a foreclosure sale by advertisement without discharging of record certain liens

⁸⁸ *Warner v. Blakeman*, 36 Barb. (N. Y.) 501, aff'd 4 Keyes (N. Y.) 487, 4 Abb. App. Dec. 530.

⁸⁹ *Demarest v. Wynkoop*, 3 Johns. Ch. (N. Y.) 129, 142, 8 Am. Dec. 467, 473.

⁹⁰ *Wilson v. Troup*, 2 Cow. (N. Y.) 195, 14 Am. Dec. 458; *Jackson v. Henry*, 10 Johns. (N. Y.) 195, 6 Am. Dec. 328; *Doolittle v. Lewis*, 7 Johns. Ch. (N. Y.) 50, 11 Am. Dec. 389; *Vroom v. Ditmas*, 4 Paige Ch. (N. Y.) 531; *Slee v. Manhattan Ins. Co.* 1 Paige Ch. (N. Y.) 70.

The validity of a foreclosure by advertisement cannot be passed upon in an action to which the purchaser is not a party. *Candee v. Burke*, 1 Hun (N. Y.) 546, 4 T. & C. (N. Y.) 143.

⁹¹ *Jackson v. Henry*, 10 Johns. (N. Y.) 195, 6 Am. Dec. 328; *Hubbell v. Sibley*, 5 Lans. (N. Y.) 51; *Vroom v. Ditmas*, 4 Paige Ch. (N. Y.) 526.

⁹² 141 N. Y. 302, 36 N. E. 322, 57 N. Y. S. R. 410.

paid off by him under his contract with the mortgagor, and becomes the purchaser, cannot object that intending purchasers might have been prevented from bidding on account of an apparently double incumbrance on the property, especially where he is not injured thereby and he knew that no one but the mortgagee could afford to take the property burdened with its actual liability.

§ 950. Effect of sale on omitted parties—Rights of tenants.—The claim of a party who was not duly served with notice in the proceedings, will not be barred, even though he had actual knowledge of the sale. Where, however, the value of the mortgaged premises is less than the amount of the mortgage debt, with the other liens prior to the lien which was not barred, such lien will be of no value, and a purchaser in good faith may maintain an action to enjoin the lienor from enforcing his claim.⁹³

The rights of a tenant holding under the mortgagor, where the demise was made subsequent to the mortgage, will be extinguished by the sale;⁹⁴ and the mortgagee, on acquiring possession of the premises, will be entitled to the crops sown by the lessee and growing on the land at the time of the sale.⁹⁵ The same rule is true as to fixtures.⁹⁶

§ 951. Purchaser's title—What passes by sale.—The effect of every statutory foreclosure is to transfer to the purchaser the rights of the mortgagee and of the mortgagor.⁹⁷

⁹³ *Root v. Wheeler*, 12 Abb. (N. Y.) Pr. 294.

⁹⁴ *Simers v. Saltus*, 3 Den. (N. Y.) 214.

⁹⁵ *Gillett v. Balcom*, 6 Barb. (N. Y.) 370; *Aldrich v. Reynolds*, 1 Barb. Ch. (N. Y.) 613; *Shephard v. Philbrick*, 2 Den. (N. Y.) 176; *Lane v. King*, 8 Wend. (N. Y.) 584, 24 Am. Dec. 105. See *Gardner v. Finley*, 19 Barb. (N. Y.) 317. See

also *Penryn Fruit Co. v. Sherman-Worrell Fruit Co.* 142 Cal. 643, 100 Am. St. Rep. 150, 76 Pac. 484. See *ante*, § 177.

⁹⁶ See *ante*, §§ 490-492, 714-717.

⁹⁷ *Briggs v. Crawford*, 121 Pac. 381 (Cal.); *Croom v. Ditmas*, 4 Paige Ch. (N. Y.) 526. Where the only deed to the purchaser produced, was one executed nineteen years after the sale, it was held

The regularity of the sale, however, constitutes the very foundation of the purchaser's title; if it is irregular, he will acquire no rights by his purchase.⁹⁸ If there are judgments subsequent to the mortgage, which continue a lien on the premises at the time of the sale, the purchaser will take the legal and equitable interest in the property as against the mortgagor and all persons claiming through and under him, subject to the equitable right of such lienors to redeem.⁹⁹

Where the mortgagee becomes the purchaser, the whole mortgage debt will be extinguished; but, if a third person purchases, the mortgagor, if compelled to pay the residue of the mortgage, will be entitled to an assignment thereof, so as to reimburse himself from the land.¹

The title of the purchaser of mortgaged premises on foreclosure by advertisement is not valid and perfect unless all the requirements of the statute under which it was made are substantially complied with.² Thus the sale is not complete until the affidavits of sale and publication and of service of notice and the certificate of sale are filed and recorded as required.³ In each instance the statute in force at the time

that as there were no intervening rights, it might be treated as good by relation back, especially in a court of equity. *Demarest v. Wynkoop*, 3 Johns. Ch. (N. Y.) 129, 8 Am. Dec. 467.

⁹⁸ See *Jackson v. Clark*, 7 Johns. (N. Y.) 217.

⁹⁹ *Benedict v. Gilman*, 4 Paige Ch. (N. Y.) 58. See *Robinson v. Ryan*, 25 N. Y. 320.

¹ *Cox v. Wheeler*, 7 Paige Ch. (N. Y.) 248.

² Thus it has been said that a certificate of foreclosure by publication, under Maine Revised Statutes, chapter 90, § 5, is fatally defective if it recites that the notice was given in a newspaper "published," instead of "printed," in the county

where the land lies. *Hollis v. Hollis*, 84 Me. 96, 24 Atl. 581.

³ *Cowdry v. Turner*, 85 Hun (N. Y.) 451, 32 N. Y. Supp. 889, 66 N. Y. S. R. 207. See *Crombie v. Little*, 47 Minn. 581, 50 N. W. 823; *Cable v. Minneapolis Stock Yards and P. Co.* 47 Minn. 417, 50 N. W. 528; *Ryder v. Hulett*, 44 Minn. 353, 46 N. W. 559; *Crombie v. Little*, 47 Minn. 581, 50 N. W. 823; *Johnson v. Day*, 2 N. D. 295, 50 N. W. 701.

In Minnesota—Failure to record certificate of sale upon foreclosure of a mortgage, though invalidating the certificate, does not avoid the sale, but another certificate may be obtained from the sheriff. *Crombie v. Little*, 47 Minn. 581, 50 N. W. 823.

of a foreclosure regulates the procedure;⁴ and the recording of a certificate of sale under a power in a mortgage ten months after the sale is a compliance with a statute which prescribes no period within which the certificate shall be recorded.⁵

The supreme court of Minnesota, in the case of *Crombie v. Little*,⁶ say that an instrument purporting to be a sheriff's deed on foreclosure, made without authority of law, or in pursuance of a certificate which has become void for failure to record it, will operate as a certificate of sale, where it contains by way of recital or positive statement all the requisites of a certificate, except that it does not in express terms state that the land is subject to redemption.

Where all the requirements of the statute are complied with, the purchaser of a mortgaged estate at a sale under a power of sale is entitled to have it with the rights and easements appurtenant to it as they existed when the power of sale was given.⁷

§ 952. Defective foreclosure.—Where a foreclosure is regularly conducted in all respects, except an omission to serve some one party with a notice of the sale, it will be

Same—Sheriff's certificate of sale upon foreclosure of a mortgage by advertisement under Minnesota General Laws 1862, chapter 19, § 3, is not invalidated by an error in stating the amount of the note secured by the mortgage, or by describing the mortgage as executed on the day of its signing, when it was in fact acknowledged on the next day. *Cable v. Minncapolis Stock Yards & P. Co.* 47 Minn. 417, 50 N. W. 528.

In North Dakota—Sale by advertisement under a mortgage is not invalidated by failure of the officer making it to comply with Dakota Compiled Laws, § 5420, by filing, within ten days after the sale,

a duplicate certificate of sale in the office where the mortgage is recorded. *Johnson v. Day*, 2 N. D. 295, 50 N. W. 701.

⁴ But the rights of the parties are determined by the law in force when the mortgage was executed. *Nichols v. Tingstad*, 10 N. D. 172, 86 N. W. 694.

⁵ *Ryder v. Hulett*, 44 Minn. 353, 46 N. W. 559.

⁶ 47 Minn. 581, 50 N. W. 823.

⁷ *Bull's Petition*, 15 R. I. 534, 10 Atl. 484. See *Swedish-American National Bank v. Connecticut Mutual Life Ins. Co.* 83 Minn. 377, 86 N. W. 420. See also *Simpson v. Wabash R. R. Co.* 145 Mo. 64, 46 S. W. 739.

valid as to all persons who were served. The persons who were properly served will be barred of their right of redemption, but the right of redemption will still remain in the party who, being entitled to notice, was not served with it.⁸

Thus, an omission to make the wife of the mortgagor a party, she having joined in the mortgage, merely leaves her the right of redemption, but it does not render the foreclosure invalid as to the other parties properly served.⁹ It seems, however, that the purchaser at such a sale, on obtaining possession of the premises, is entitled to retain it until the amount due on the mortgage is paid to him.¹⁰

Where subsequent incumbrancers were not properly cut off by the proceedings under the statute, a strict foreclosure was formerly held to be the proper remedy to extinguish such rights.¹¹

If a statutory foreclosure is set aside for any reason, proceedings for the foreclosure of the mortgage may be commenced *de novo*. This is also true if an attempted foreclosure fails for any cause whatever; the mortgage does not become null and void by such failure, but stands restored and as though no proceedings had ever been taken upon it.¹²

It is thought that a sale by advertisement under a mortgage providing for an attorney's fee is not invalidated by the fact that such fee was included in the amount for which the land was sold, without the affidavit required by the statute,¹³ to entitle the mortgagee to collect the fee; but in such case, if the proceeds of the sale were sufficient to cover the mortgage debt and all the costs and disbursements, including such fee, the mortgagor may collect the amount of such fee from the officer making the sale.¹⁴ The supreme court of Michigan

⁸ *Groff v. Morehouse*, 51 N. Y. 503; *Wetmore v. Roberts*, 10 How. (N. Y.) Pr. 51; *Vanderkemp v. Shelton*, 11 Paige Ch. (N. Y.) 28.

⁹ *Candee v. Burke*, 1 Hun (N. Y.) 546.

¹⁰ *Brown v. Smith*, 116 Mass. 108.

¹¹ *Benedict v. Gilman*, 4 Paige Ch. (N. Y.) 58, 63.

¹² *Stackpole v. Robbins*, 48 N. Y. 665.

¹³ Dak. Comp. L. § 5429.

¹⁴ *Johnson v. Day*, 2 N. D. 295, 50 N. W. 701.

say that a sale under statutory foreclosure by advertisement of a mortgage given as collateral to the debt of a third person, primarily secured by a chattel and a real estate mortgage, is void where the mortgagee has taken possession of the chattels without foreclosure or sale, and has taken no steps to foreclose the real estate mortgage.¹⁵

Where a foreclosure sale is had without a sufficient power of sale in the mortgage, the purchaser, although not obtaining title, nevertheless succeeds to the rights of the mortgagee.¹⁶

§ 953. Affidavits of the proceedings.—The New York Code of Civil Procedure¹⁷ provides, that “an affidavit of the sale, stating the time when, and the place where, the sale was made; the sum bid for each distinct parcel, separately sold; the name of the purchaser of each distinct parcel; and the name of the person or persons, court officer or other officer, to whom the proceeds of the sale were paid, and the sums thereof must be made by the person who officiated as auctioneer upon the sale. An affidavit of the publication of the notice of sale, and of the notice or notices of postponement, if any, may be made by the publisher¹⁸ or printer of the newspaper in which they were published, or by his foreman, or principal clerk. An affidavit of the affixing of a copy of the notice, at or near the entrance of the proper court house, may be made by the person who so affixed it, or by any person who saw it so affixed, at least eighty-four days before the day of sale.¹⁹ An affidavit of the affixing of a copy of the notice in the book, kept by the county clerk, may be made by the county clerk, or by any person who saw it so affixed, at least eighty-four days before the day of sale. An affidavit of the service

¹⁵ *Drayton v. Chandler*, 93 Mich. 383, 53 N. W. 558.

¹⁶ *Larivierre v. Rains*, 112 Mich. 276, 70 N. W. 583.

¹⁷ N. Y. Code Civ. Proc. § 2396.

¹⁸ The publisher of the newspaper may make the affidavit of publica-

tion, required by law to be made by the printer, or his foreman, or principal clerk. *Bunce v. Reed*, 16 Barb. (N. Y.) 347.

¹⁹ *Hornby v. Cramer*, 12 How. (N. Y.) Pr. 490.

of a copy of the notice upon the mortgagor, or upon any other person, upon whom the notice must or may be served, may²⁰ be made by the person who made the service. Where two or more distinct parcels are sold to different purchasers, separate affidavits may be made with respect to each parcel, or one set of affidavits may be made for all the parcels.”²¹

The Code also provides,²² that “the matters required to be contained in any or all of the affidavits above specified, may be contained in one affidavit, where the same person deposes with respect to them. A printed copy of the notice of sale must be annexed to each affidavit; and a printed copy of each notice of postponement must be annexed to the affidavit of publication, and to the affidavit of sale. But one copy of the notice suffices for two or more affidavits, where they all refer to it, and are annexed to each other, and filed and recorded together.”²³

§ 954. Sufficiency of affidavits.—It has been held, that a sale made under a foreclosure by advertisement, pursuant to the statute, will bar the equity of redemption, although the usual affidavits may not be made.²⁴ The earlier cases held, that every requirement of the statute must be strictly complied with; and that if the premises are purchased by the mortgagee, the foreclosure will not be complete without the affidavits which stand in the place of the deed.²⁵ But

²⁰ The statute is permissive, but carries permission only to the person who made the service. *Deutsch v. Haab*, 135 App. Div. 756, 119 N. Y. Supp. 911.

²¹ N. Y. Code Civ. Proc. § 2396. See *Mowry v. Sanborn*, 72 N. Y. 534, 68 N. Y. 153, 65 N. Y. 581; *Hubbell v. Sibley*, 50 N. Y. 468; *Bryan v. Butts*, 27 Barb. (N. Y.) 503; *Hornby v. Cramer*, 12 How. (N. Y.) Pr. 490.

²² N. Y. Code Civ. Proc. § 2397.

²³ *Mowry v. Sanborn*, 72 N. Y. 534.

²⁴ See *Mowry v. Sanborn*, 68 N. Y. 153; *Tuthill v. Tracy*, 31 N. Y. 157; *Howard v. Hatch*, 29 Barb. (N. Y.) 297; *Osborn v. Merwin*, 12 Hun (N. Y.) 332, revs'g 50 How. (N. Y.) Pr. 183. See N. Y. Code Civ. Proc. § 2400.

²⁵ *Bryan v. Butts*, 27 Barb. (N. Y.) 503; *Layman v. Whiting*, 20 Barb. (N. Y.) 559; *Cohoes Co. v. Gross*, 13 Barb. (N. Y.) 138; *Arnot v. McClure*, 4 Den (N. Y.) 41.

it is said in the case of *Mowry v. Sanborn*,²⁶ that the statutory proofs of foreclosure and sale are to be liberally construed, and are only required to be certain to a common intent; and that if they are so, though technically defective, they will be sufficient.

If no affidavits are made, and a person other than the mortgagee becomes the purchaser, common-law proof may be made of the publication of the notice.²⁷ Where the affidavits of publication and sale operate as a conveyance, they cannot be controverted by the purchaser and those claiming under him;²⁸ but such affidavits are not conclusive as to the facts therein stated, when the premises are purchased by the owner of the mortgage. Where the terms of the sale are not stated in the affidavits, oral evidence will be admissible to prove them.²⁹

§ 955. Contents of affidavits.—The affidavits should show that the proceedings were conducted according to the statute in force when the default occurred;³⁰ they must be full enough in details to show that the statute was complied with, because a foreclosure by advertisement is technical and not a proceeding in which a court of equity can remedy defects.³¹ An affidavit which simply states, that publication of the notice of sale was had “in each week,” instead of “in each and every week,”³² or that the notice of sale was affixed to the door of the court house in said county, “the place where the courts are directed to be held,”³³ or that the notice was affixed twelve weeks before the sale, without showing that

²⁶ 72 N. Y. 534, revs'g 11 Hun (N. Y.) 545.

²⁷ *Brewster v. Power*, 10 Paige Ch. (N. Y.) 562. See also *Chalmers v. Wright*, 5 Robt. (N. Y.) 713.

²⁸ *Layman v. Whiting*, 20 Barb. (N. Y.) 559; *Arnot v. McClure*, 4 Den. (N. Y.) 41.

²⁹ *Story v. Hamilton*, 86 N. Y.

428; *Mowry v. Sanborn*, 72 N. Y. 534, 68 N. Y. 153.

³⁰ *James v. Stull*, 9 Barb. (N. Y.) 482.

³¹ *Dwight v. Phillips*, 48 Barb. (N. Y.) 116.

³² *Howard v. Hatch*, 29 Barb. (N. Y.) 297.

³³ *Bunce v. Reed*, 16 Barb. (N. Y.) 347.

the party making the affidavit afterwards saw it there, is sufficient.³⁴

But it is not enough to state, that the notice was posted "in a proper manner," or served on "certain persons named therein," or that it "was properly folded and directed," and that a "proper postage-stamp was placed on each of said letters," without stating the mode of folding and directing, and the place of residence of the persons for whom the notice was intended.³⁵ The affidavits must show that the places to which the notices were mailed to the parties, were the residences of such parties,³⁶ because the fact of residence is important, and should be stated positively and with accuracy;³⁷ but it seems that a foreclosure by advertisement and sale will not be void, because the affidavit of service of the notice on the mortgagors by mail, was on information and belief only, as to their place of residence, where it is not shown that the mortgagors failed to receive such notices, or that they did not reside at the place mentioned in the affidavit, at the time the notices were mailed to them.³⁸

In New York, since the amendment of 1844, requiring service of the notice, as well as the publication and posting thereof, the affidavit must state that such service was made.³⁹ A statement in the affidavit that service was made upon a person, naming him as "administrator," has been held sufficient, and it has been held further, that the object of the statute was thereby fully complied with.⁴⁰

§ 956. Amending affidavits.—If the affidavits are defective, it seems that amended affidavits may be filed according

³⁴ *Hornby v. Cramer*, 12 How. (N. Y.) Pr. 490.

³⁵ *Chalmers v. Wright*, 5 Robt. (N. Y.) 713.

³⁶ *Dwight v. Phillips*, 48 Barb. (N. Y.) 116.

³⁷ *Mowry v. Sanborn*, 7 Hun (N. Y.) 380, 62 Barb. (N. Y.) 223.

³⁸ *Mowry v. Sanborn*, 62 Barb. (N. Y.) 223.

³⁹ *Layman v. Whiting*, 20 Barb. (N. Y.) 559.

⁴⁰ *George v. Arthur*, 2 Hun (N. Y.) 406, 4 T. & C. (N. Y.) 635.

to the facts; as against the mortgagor, at least, they may be filed at any time.⁴¹ But in an action for ejectment, brought against the purchaser at a sale, it was held that the court had no power to allow the purchaser to amend the affidavits so as to state the facts omitted. Statutory proceedings to foreclose a mortgage are not proceedings in a court, such as to authorize the court to supply omissions, or to remedy defects in the affidavits.⁴²

§ 957. **Recording affidavits.** — The Code provides,⁴³ that the affidavits required to be made “may be filed in the office for recording deeds and mortgages, in the county where the sale took place. They must be recorded at length by the officer with whom they are filed, in the proper book for recording deeds. The original affidavits, so filed, the record thereof, and a certified copy of the record, are presumptive evidence of the matters of fact therein stated, with respect to any property sold, which is situated in that county. Where the property sold is situated in two or more counties, a copy of the affidavits, certified by the officer with whom the originals are filed, may be filed and recorded in each other county, wherein any of the property is situated. Thereupon the copy and the record thereof have the like effect, with respect to the property in that county, as if the originals were duly filed and recorded therein.”

The Code also provides,⁴⁴ that “a clerk or a register, who records any affidavits, or a certified copy thereof, filed with him, must make a note upon the margin of the record of the mortgage, in his office, referring to the book and page, or the copy thereof, where the affidavits are recorded.”

The title of a mortgagee, who purchases the premises on

⁴¹ *Bunce v. Reed*, 16 Barb. (N. Y.) 347. See *Story v. Hamilton*, 86 N. Y. 428; *Mowry v. Sanborn*, 72 N. Y. 534. But a different rule seems to be held in *Dwight v. Phillips*, 48 Barb. (N. Y.) 116.

⁴² *Dwight v. Phillips*, 48 Barb. (N. Y.) 116.

⁴³ N. Y. Code Civ. Proc. § 2398.

⁴⁴ N. Y. Code Civ. Proc. § 2399.

foreclosure by advertisement, is not complete until the affidavits of sale and publication and of service of notice are filed and recorded.⁴⁵

§ 958. **Necessity of recording affidavits.**—An affidavit of the service of the notice of sale upon the parties entitled thereto, is a necessary part of the record; without it, the record will be fatally defective.⁴⁶ In a foreclosure by advertisement the legal title to the premises is transferred by recording the affidavits; a plaintiff in ejectment, claiming under a statutory foreclosure, cannot support his action by procuring the necessary affidavits in the foreclosure, to be made subsequently to the commencement of the action in ejectment.⁴⁷

The filing and recording of the affidavits is not necessary, however, as against the mortgagor's equity of redemption, which is effectually barred and foreclosed by the sale, notwithstanding the fact that the affidavit of the publication of the notice of sale, and of the posting thereof, may not have been made and recorded as required by statute, until fifteen years thereafter, and after an action to redeem was brought. Neither will the equitable title of the purchaser be defeated by a claim to redeem.⁴⁸

§ 959. **Contradicting affidavits.**—The affidavits required to be filed in a foreclosure by advertisement, may be contro-

⁴⁵ *Cowdrey v. Turner*, 85 Hun (N. Y.) 451, 66 N. Y. S. R. 207, 32 N. Y. Supp. 889.

⁴⁶ *Mowry v. Sanborn*, 65 N. Y. 581, reversing 62 Barb. (N. Y.) 223. For further decisions, see 68 N. Y. 153, reversing 7 Hun (N. Y.) 380, and 72 N. Y. 534, reversing 11 Hun (N. Y.) 545. It is held in some cases, however, that the recording of the affidavits of publication and posting is not necessary to perfect the title. See *Mowry v. Sanborn*,

68 N. Y. 153, 164; *Howard v. Hatch*, 29 Barb. (N. Y.) 297; *Osborn v. Merwin*, 12 Hun (N. Y.) 332; *Frink v. Thompson*, 4 Lans. (N. Y.) 489.

⁴⁷ *Tuthill v. Tracy*, 31 N. Y. 157; *Bryan v. Butts*, 27 Barb. (N. Y.) 503; *Layman v. Whiting*, 20 Barb. (N. Y.) 559; *Cohoes Co. v. Goss*, 13 Barb. (N. Y.) 137; *Arnot v. McClure*, 4 Den. (N. Y.) 41.

⁴⁸ *Tuthill v. Tracy*, 31 N. Y. 157.

verted by the mortgagor, or by any person claiming under him; and any of the facts stated therein may be disproved by any person except the mortgagee and those claiming under him.⁴⁹

Such affidavits, being made *ex parte*, are only *prima facie* evidence of the facts stated therein;⁵⁰ they are merely evidence of the exercise of the power of sale as prescribed by statute for the benefit of the purchaser, and he may show facts necessary to correct any errors therein.⁵¹ But the mortgagee and those claiming under him in an action to recover possession of the premises, must stand on the affidavits, as they existed at the time of the action.⁵²

§ 960. Effect of affidavits.—The affidavits required in a foreclosure by advertisement are simply evidence of the completion of the proceedings, and are for the benefit of the purchaser at the sale, and may be made at any time after the sale has been completed.⁵³ The mortgagor has a right to retain possession of the mortgaged premises under foreclosure by advertisement, however, until the foreclosure is perfected by the making and filing of the affidavits⁵⁴ just as under a

⁴⁹ *Sherman v. Willett*, 42 N. Y. 146; *Mowry v. Sanborn*, 62 Barb. (N. Y.) 223, 7 Hun (N. Y.) 380. See *Arnot v. McClure*, 4 Den. (N. Y.) 41.

⁵⁰ *Story v. Hamilton*, 86 N. Y. 428, aff'g 20 Hun (N. Y.) 133.

⁵¹ *Story v. Hamilton*, 86 N. Y. 428.

⁵² *Dwight v. Phillips*, 48 Barb. (N. Y.) 116; *Mowry v. Sanborn*, 7 Hun (N. Y.) 380. But see *Bryan v. Butts*, 27 Barb. (N. Y.) 503. It is thought by some that, inasmuch as the affidavits may be made at any time after the sale, there is no reason why they may not be corrected at any time, if such corrections, when made prior to the com-

mencement of an action to redeem, are material to their maintenance, or that such affidavits may be made even after the commencement of such an action. *Bunce v. Reed*, 16 Barb. (N. Y.) 347. See *Story v. Hamilton*, 86 N. Y. 428; *Mowry v. Sanborn*, 68 N. Y. 153.

⁵³ *Tuthill v. Tracy*, 31 N. Y. 157. See *Osborn v. Merwin*, 12 Hun (N. Y.) 332; *Hawley v. Bennett*, 5 Paige Ch. (N. Y.) 104.

⁵⁴ *Bryan v. Butts*, 27 Barb. (N. Y.) 503; *Layman v. Whiting*, 20 Barb. (N. Y.) 559; *Arnot v. McClure*, 4 Den. (N. Y.) 41. See *Tuthill v. Tracy*, 31 N. Y. 157; *Howard v. Hatch*, 29 Barb. (N. Y.) 297.

judgment of foreclosure in an equitable action he is entitled to retain possession until the execution and delivery of the deed by the officer making the sale.⁵⁵

The affidavits required by the statute are instruments of conveyance as well as evidence authorizing a conveyance, and the title does not pass until they are completed and filed.⁵⁶ But the more recent cases hold, that the recording of such affidavits is not necessary to pass the title to the purchaser, because the statute does not make recording essential, and it seems that the affidavits themselves are made by the statute as good evidence of the facts as the record itself.⁵⁷

§ 961. **Necessity for deed.**—Under the New York Code of Civil Procedure,⁵⁸ “the purchaser of the mortgaged premises, upon a sale conducted as prescribed by this statute, obtains title thereto, against all persons bound by the sale, without the execution of a conveyance. Except where he is the person authorized to execute the power of sale, such a purchaser also obtains title, in like manner, upon payment of the purchase money, and compliance with the other terms of sale, if any, without the filing and recording of the affidavits, as prescribed by this statute. But he is not bound to pay the purchase money, until the affidavits of foreclosure, with respect to the property purchased by him, are filed, or delivered, or tendered to him for filing.”

It is said by the supreme court of Wisconsin, in the case of *Nan v. Burnette*,⁵⁹ that under the statutes of that state,⁶⁰ no deed is required upon the sale of mortgaged premises under a power in the mortgage, when the purchaser is the assignee and holder of the foreclosed mortgage.

⁵⁵ *Mitchell v. Bartlett*, 51 N. Y. 447. See *ante*, § 718.

⁵⁶ *Bryan v. Butts*, 27 Barb. (N. Y.) 503; *Layman v. Whiting*, 20 Barb. (N. Y.) 559; *Arnot v. McClure*, 4 Den. (N. Y.) 41.

⁵⁷ *Mowry v. Sanborn*, 68 N. Y.

153, 164; *Howard v. Hatch*, 29 Barb. (N. Y.) 297; *Osborn v. Merwin*, 12 Hun (N. Y.) 332; *Frink v. Thompson*, 4 Lans. (N. Y.) 489.

⁵⁸ N. Y. Code Civ. Proc. § 2400.

⁵⁹ 79 Wis. 664, 48 N. W. 649.

⁶⁰ Wis. Rev. Stat. 1878, § 3541.

Where a deed is required and given on sale in foreclosure by advertisement under power in a trust deed or mortgage, it is valid without a recital by the trustee in his deed to the purchaser of the exact date of the sale.⁶¹ It has been said that there is a sufficient description and identification of the grantor in a deed to the purchaser at trustee's sale under a trust deed, where, although the trustee's name is not mentioned in the body of his deed, the recitals thereof furnish the means of clearly identifying him.⁶² The supreme court of Michigan, in the case of *Cook v. Foster*,⁶³ say that such a deed is not void because the deed is executed by the undersheriff, and acknowledged before the sheriff in the capacity of a notary public, under the statute of that state,⁶⁴ providing that the sale may be made by the undersheriff among others, and the deed executed by the officer or person making the sale.

§ 962. Obtaining possession by purchaser—Summary proceedings.—The New York Code provides,⁶⁵ that where property has been duly sold upon the foreclosure, by the proceedings above prescribed, of a mortgage executed by the party in possession, or by a person under whom he claims, and the title has been duly perfected, that notice to quit the same may be given, and he may be removed therefrom in the manner prescribed by statute for summary ejectment. In such a proceeding, it is thought to be sufficient to produce before the court the record of the proceedings on foreclosure.⁶⁶

If the proceedings in the foreclosure were regular, the validity of the mortgage, or the motives of the applicant, cannot be inquired into in summary proceedings; but it is the duty of the court to examine the evidence of the foreclosure and

⁶¹ *Jones v. Hagler*, 95 Ala. 529, 10 So. 345.

⁶² *Jones v. Hagler*, 95 Ala. 529, 10 So. 345.

⁶³ 96 Mich. 610, 55 N. W. 1019.

⁶⁴ 2 How. Mich. Stat. §§ 8501, 8505.

⁶⁵ New York Code Civ. Procedure, § 2232.

⁶⁶ *People ex rel. Bridenbecker v. Prescott*, 3 Hun (N. Y.) 419, 424; *Brown v. Betts*, 13 Wend. (N. Y.) 32.

to ascertain whether the papers upon their face confer a right to the possession of the property.⁶⁷

The supreme judicial court of Massachusetts, in the case of *North Brookfield Savings Bank v. Flanders*,⁶⁸ say that a mortgagee in a mortgage containing a power of sale, and giving him authority to purchase at a sale thereunder, who procures another to become the purchaser as his agent, and simultaneously to execute a quitclaim deed of the lands to him, may maintain an action under the statute of that state,⁶⁹ to recover the possession, providing that on such sale under a power in the mortgage is entitled to the premises, may recover possession thereof by summary proceedings as therein provided. The court of civil appeals of Texas, in the case of *Meyer v. Orynski*,⁷⁰ say that a purchaser of lands at a sale under a trust deed is entitled to a writ of sequestration, and to the seizure thereunder of the lands, where they are withheld from him by an assignee for creditors of the mortgagor, whose assignment was executed after the execution of the trust deed.

⁶⁷ *Getting v. Mohr*, 34 Hun (N. Y.) 340.

See also *Allen v. Chapman*, 168 Mas. 442, 47 N. E. 124.

⁶⁸ 161 Mass. 335, 37 N. E. 307.

⁷⁰ 25 S. W. 655.

⁶⁹ Mass. Pub. Stat. c. 175, § 1.

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CHAPTER XXXV.

STRICT FORECLOSURE.

- § 963. Nature of the remedy.
- § 964. Effect of a strict foreclosure.
- § 965. A severe remedy.
- § 966. In what states allowed.
- § 967. In what states not allowed.
- § 968. Illinois doctrine and practice.
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- § 970. Has strict foreclosure been abolished by the Code in New York?
- § 971. Jurisdiction of court to decree a strict foreclosure in another state.
- § 972. Parties to a strict foreclosure.
- § 973. Who may maintain a strict foreclosure.
- § 974. Strict foreclosure against infants.
- § 975. Pleadings in a strict foreclosure.
- § 976. Judgment in a strict foreclosure.
- § 977. Time for redemption.
- § 978. Setting aside and opening strict foreclosure.

§ 963. Nature of the remedy.—The remedy of strict foreclosure, which operates to transfer to the mortgagee the entire mortgaged estate, is regarded with disfavor by the courts of this country. This method of foreclosure had its origin at a time when a mortgage was regarded as a conditional sale of the land, rather than as a security for the payment of a debt. Chancellor Jones has said, in *Lansing v. Goellet*:⁷¹ "In early times when a mortgage was still regarded as a conditional sale of the land, rather than as a mere security for the payment of a debt, an adherence to the form of the condition in the application of the remedy of the mortgagee, was natural; and it would necessarily lead to the decree of strict foreclosure, requiring the mortgagor to perform the

⁷¹ 9 Cow. (N. Y.) 346, 352.

condition by paying the debt within a given time, to be limited by the court, or be forever barred from his right to redeem."

This method of foreclosure proceeds upon the theory that the mortgagee or purchaser has acquired the legal title and obtained possession of the estate, but that the right and equity of redemption have not been cut off or barred,⁷² and that the legal title of the mortgagor having been acquired, the remedy by strict foreclosure is proper to cut off the right and equity of junior incumbrancers to redeem.⁷³

With the establishment of the doctrine now prevailing in this country, that a mortgage is a mere security for the payment of a debt, a breach of the condition for payment merely giving to the mortgagee a right to proceed against the security, the natural remedy for such breach was to sell the property and apply the proceeds thereof to the payment of the mortgage debt. The advantages to the debtor of a sale of the property, instead of a strict foreclosure, were much discussed before the practice of ordering a sale was adopted, and became the almost universal remedy as it now is.⁷⁴

§ 964. **Effect of a strict foreclosure.**—The effect of a foreclosure, is to transfer to the mortgagee the land for the debt.⁷⁵ The deed, made absolute by foreclosure, continues be-

⁷² *Jefferson v. Coleman*, 110 Ind. 515, 11 N. E. 465.

⁷³ *Jefferson v. Coleman*, 110 Ind. 515, 11 N. E. 465.

⁷⁴ See *Bolles v. Duff*, 43 N. Y. 469, 10 Abb. (N. Y.) Pr. N. S. 399, 41 How. (N. Y.) Pr. 355, 55 Barb. (N. Y.) 313, 580, 7 Abb. (N. Y.) Pr. N. S. 385, 38 How. (N. Y.) Pr. 492, 505; *Lansing v. Goelet*, 9 Cow. (N. Y.) 346; *Ross v. Boardman*, 22 Hun (N. Y.) 527, 531; *Mills v. Dennis*, 3 Johns. Ch. (N. Y.) 367; *Mussina v. Bartlett*, 8 Port. (Ala.) 277; *Williams' Case*, 3 Bland. Ch. (Md.) 186, 193; *Wilder v. Haughey*, 21 Minn. 101.

⁷⁵ *Lansing v. Goelet*, 9 Cow. (N. Y.) 346, 352. In this case the court say: "In a country where the laws do not permit the sale of real estate by execution at law, for the satisfaction of debts, there might be some apology for preferring the foreclosure to the sale. But in modern times, when the more liberal principle has gained the ascendancy, which deals with the mortgage as being, in its substance and legal effect, a mere security for the payment of the debt; and in this state, where the lands of the debtor are subjected to sale for the satisfaction of his debts, it would be

tween its parties to be a grant of the land on which it is foreclosed.⁷⁶ A strict foreclosure merely extinguishes the right of redemption.⁷⁷ It does not become operative as a satisfaction of the debt,⁷⁸ until the time fixed by the decree for the redemption of the premises has expired.⁷⁹

It has been said, that the debt will not be extinguished by such a foreclosure,⁸⁰ unless the property is of sufficient value to satisfy it,⁸¹ but that the foreclosure simply operates as a payment *pro tanto*.⁸² In this form of foreclosure there can

strange, indeed, that a court of equity should be without the power to decree a sale of the mortgaged premises for the satisfaction of the debt, and the mortgagee confined to a decree for a strict foreclosure."

⁷⁶ *Fletcher v. Chamberlin*, 61 N. H. 438.

⁷⁷ *Brainard v. Cooper*, 10 N. Y. 359; *Bradley v. Chester Valley R. Co.* 36 Pa. St. 150.

In the case of *Champion v. Hinkle* (45 N. J. Eq. (18 Stew.) 162, 16 Atl. 701, 12 New Jersey L. J. 87), the New Jersey court of chancery say: At common law in a strict foreclosure suit the decree simply cut off the equity of redemption and foreclosed the mortgagor from redeeming the estate by payment of the mortgage debt. Thereafter the mortgagee was in as of the estate granted and conveyed by the mortgage, discharged from the condition of defeasance, and he held the estate as if the original conveyance had been absolute.

⁷⁸ *Spencer v. Harford*, 4 Wend. (N. Y.) 381, 384.

⁷⁹ *Peck's Appeal*, 31 Conn. 215; *Edgerton v. Young*, 43 Ill. 464; *Fletcher v. Chamberlain*, 61 N. H. 438.

⁸⁰ *Vansant v. Allmon*, 23 Ill. 30; *Nunemacher v. Ingle*, 20 Ind. 135; *Brown v. Wernwag*, 4 Blackf. (Ind.) 1; *Germania Building Assoc. v. Neill*, 93 Pa. St. 322; *Devereaux v. Fairbanks*, 52 Vt. 587; *Smith v. Lamb*, 1 Vt. 395; *Strong v. Strong*, 2 Aik. (Vt.) 373.

⁸¹ *DeGrant v. DeGraham*, 1 N. Y. Leg. Obs. 75; *Morgan v. Plumb*, 9 Wend. (N. Y.) 287. See *Lansing v. Goelet*, 9 Cow. (N. Y.) 346, 352; *Globe Ins. Co. v. Lansing*, 5 Cow. (N. Y.) 380, 15 Am. Dec. 274; *Charter v. Stevens*, 3 Den. (N. Y.) 35, 45 Am. Dec. 444; *Craig v. Tappan*, 2 Sandf. Ch. (N. Y.) 78; *Case v. Boughton*, 11 Wend. (N. Y.) 106; *Spencer v. Harford*, 4 Wend. (N. Y.) 381, 384; *Hatch v. White*, 2 Gall. C. C. 152. It seems that formerly in Connecticut a strict foreclosure operated to extinguish the debt without regard to the value of the property. *Swift v. Edson*, 5 Conn. 531; *Derby Bank v. Landon*, 3 Conn. 62; *Fitch v. Coit*, 1 Root (Conn.) 266; *McEven v. Welles*, 1 Root (Conn.) 202, 1 Am. Dec. 39.

⁸² *Paris v. Huelett*, 26 Vt. 308.

be no judgment for deficiency;⁸³ to recover a deficiency, the mortgagee will be relegated to an action at law upon the debt.

The supreme court of Indiana, in the case of *Jefferson v. Coleman*,⁸⁴ say that a person holding the legal title to an undivided third in property sold under a foreclosure to which he was not a party cannot be deprived of her interest by a strict foreclosure.

§ 965. **A severe remedy.**—Strict foreclosure is generally regarded in courts of equity as a severe remedy. It is now rarely pursued or allowed, except in cases where a foreclosure by an equitable action has been defectively conducted and some judgment creditor, or other subsequent lienor or incumbrancer, not having been made a party to the action, has a right to redeem. As to him, a strict foreclosure is proper and effective, and, furthermore, the quickest and least expensive procedure that can be pursued.⁸⁵

§ 966. **In what states allowed.**—Strict foreclosure is the usual procedure for enforcing mortgages in Connecticut,⁸⁶ and in Vermont;⁸⁷ where the interests of the parties seem to require it, it is also allowed in Alabama,⁸⁸ Illi-

⁸³ *Bean v. Whitcomb*, 13 Wis. 431.

⁸⁴ 110 Ind. 515, 11 N. E. 465.

⁸⁵ *Bolles v. Duff*, 43 N. Y. 469, 474.

⁸⁶ *Palmer v. Mead*, 7 Conn. 149, 152; Conn. Gen. Stats. 358.

⁸⁷ *Peris v. Hulett*, 26 Vt. 308. See *Sprague v. Rockwell*, 51 Vt. 401.

⁸⁸ Where the parties to the mortgage have provided for it, and it is for their interests. *Hunt v. Lewin*, 4 Stew. & P. (Ala.) 138. It is said to be the proper remedy, for the purpose of cutting off intermediate incumbrances and liens, where the mortgagee has acquired

title to the equity of redemption and it is worth no more than the debt. *Hitchcock v. Bank of Pennsylvania*, 7 Ala. 386.

It is said by the Supreme Court of Alabama, in the case of *Grandin v. Hart*, 80 Ala. 116, that the mortgage having been given to secure the payment of a note which the mortgagor had assigned to the mortgagee, and containing a stipulation that the latter should not "institute any proceeding to foreclose," until the maker and indorser had been sued to insolvency, the right to take possession is postponed until the happening of this contingency;

nois,⁸⁹ Iowa,⁹⁰ Louisiana,⁹¹ Maine,⁹² Massachusetts,⁹³ Michigan,⁹⁴ Minnesota,⁹⁵ New Jersey,⁹⁶ North Carolina,⁹⁷ and Wis-

and the mortgagee cannot maintain ejectment before that time.

⁸⁹ Where the premises are not worth the face of the mortgage, and the mortgagor is insolvent. *Stephens v. Bicknell*, 27 Ill. 444, 81 Am. Dec. 242; also where the interests of both parties require it. See *Johnson v. Donnell*, 15 Ill. 97; *Boyer v. Boyer*, 89 Ill. 447, 8 Cent. L. J. 213. See *post*, § 968.

⁹⁰ Where a junior lienholder has not been made a party to a suit to foreclose a prior mortgage, the purchaser at the foreclosure sale may require such lienholder to exercise his right of redemption, or, in default thereof, to be foreclosed and barred of all his rights. *Shaw v. Heisey*, 48 Iowa, 468.

⁹¹ *Levy v. Lake*, 43 La. An. 1034, 10 So. 375.

⁹² *Williams v. Hilton*, 35 Me. 547, 58 Am. Dec. 729; *Snow v. Pressey*, 82 Me. 552, 20 Atl. 78.

Where mortgage covers two parcels of land.—In those cases where the mortgage covers two distinct parcels of real estate, the mortgagee, after condition is broken, may maintain a real action to recover possession of but one parcel. If a conditional judgment is rendered in such an action, it must be for the full amount due on the mortgage debt. *Phillips v. Crippen* (Me.) 5 Atl. 69.

⁹³ *Norton v. Palmer*, 142 Mass. 433; *Thompson v. Tappan*, 139 Mass. 506; *Thompson v. Kenyon*, 100 Mass. 108; *Green v. Kemp*, 13 Mass. 515, 7 Am. Dec. 169; *Pomeroy v. Winship*, 12 Mass. 514, 7 Am.

Dec. 91; *Shepard v. Richardson*, 145 Mass. 32, 11 N. E. 738.

The supreme judicial court of Massachusetts, in the case of *Shepard v. Richardson*, 145 Mass. 32, 11 N. E. 738, hold that a power of sale and the intervention of trustees do not necessarily take from the court the power to decree a strict foreclosure.

⁹⁴ *Dohm v. Haskin*, 88 Mich. 144, 50 N. W. 108.

⁹⁵ *Backus v. Burke*, 48 Minn. 260, 51 N. W. 284; *Burke v. Baldwin*, 51 Minn. 181; 53 N. W. 460; *Burke v. Backus*, 51 Minn. 174, 53 N. W. 458.

Heyward v. Judd, 4 Minn. 483, but the courts of this state are adverse to this method of foreclosure, and will in most cases confine the mortgagee to a sale of the property. See *Wilder v. Haughey*, 21 Minn. 101.

⁹⁶ See *Pettingil v. Hubbell* (N. J. Ch.), 32 Atl. 76; *Lockard v. Hendrickson* (N. J. Ch.) 25 Atl. 512; *Champion v. Hinkle*, 45 N. J. Eq. (18 Stew.) 162, 16 Atl. 701, 12 N. J. L. J. 87.

In New Jersey it is held, in the case of *Leeds v. Gifford*, 41 N. J. Eq. 49, 5 Atl. 759, that a mortgagee may take possession of the premises to obtain payment of his debt; and a payment so obtained is subject, in respect to its appropriation, to the legal rules which govern the appropriation of other payments.

⁹⁷ In this state foreclosure was formerly made without a sale. See *Fleming v. Sitton*, 1 Dev. & B. (N. C.) Eq. 621; subsequently it be-

consin.⁹⁸ This method of foreclosure has sometimes been allowed in Kentucky,⁹⁹ Nebraska,¹ New York,² Ohio,³ Oregon⁴ and West Virginia.⁵

§ 967. In what states not allowed.—In Colorado,⁶ Nebraska and many of the western states a mortgage cannot be foreclosed by strict foreclosure, but only by an action brought for that purpose, and by judgment and decree.⁷

In California, it is said that the foreclosure of a mortgage in the English sense, by which the mortgagor, after default,

came the practice in all instances to direct a sale on application, but if no application was made, to decree a strict foreclosure. See *Green v. Crockett*, 2 Dev. & B. (N. C.) Eq. 390.

⁹⁸ *Sage v. McLaughlin*, 34 Wis. 550; *Bean v. Whitcomb*, 13 Wis. 431. For the parties consent, see also *Bresnahan v. Bresnahan*, 46 Wis. 385.

The owner of the legal title may, with propriety, maintain a proceeding in the nature of a strict foreclosure, to bar the interest of the persons who have a mere lien upon, or right of redemption in, the land. *Bresnahan v. Bresnahan*, 46 Wis. 385, 1 N. W. 39.

⁹⁹ But the Kentucky Code of Procedure now provides, that there shall be a sale in all cases; Ky. Code of 1867, § 404, Code of 1876, § 375. See *Caufman v. Sayre*, 2 B. Mon. (Ky.) 202.

¹ *South Omaha Savings Bank v. Levy*, 1 Neb. (Unof.) 255, 95 N. W. 603. See *Fiske v. Mayhew*, 90 Neb. 196, 133 N. W. 195.

Under the territorial statutes providing for a sale, it was held that a strict foreclosure might be decreed. *Woods v. Shields*, 1 Neb.

453, but at present, it seems that the remedy is confined to a sale of the premises. See *Kyger v. Ryley*, 2 Neb. 20.

² *Bolles v. Duff*, 43 N. Y. 469, 10 Abb. (N. Y.) Pr. N. S. 399, 414, 41 How. (N. Y.) Pr. 355; *Kendall v. Treadwell*, 5 Abb. (N. Y.) Pr. 16, 14 How. (N. Y.) Pr. 165; *Blanco v. Foote*, 32 Barb. (N. Y.) 535; *Franklyn v. Hayward*, 61 How. (N. Y.) Pr. 46; *Ross v. Boardman*, 22 Hun (N. Y.) 531; *Benedict v. Gilman*, 4 Paige Ch. (N. Y.) 58. But it is thought that strict foreclosure has been abolished in New York. See N. Y. Code Civ. Proc. § 1626. See *post*, § 969.

³ Where two-thirds of the value of the mortgaged premises did not exceed the debt. See *Higgins v. West*, 5 Ohio, 554, Anon. 1 Ohio, 235.

⁴ *Flanagan Estate v. Great Central Land Co.* 45 Or. 335, 77 Pac. 485.

⁵ *Froidevaux v. Jordan*, 64 W. Va. 388, 131 Am. St. Rep. 911, 62 S. E. 686.

⁶ *Nevin v. Lulu & W. Silver Min. Co.* 10 Colo. 357, 15 Pac. 611.

⁷ *Nevin v. Lulu & W. Min. Co.* 10 Colo. 357, 15 Pac. 611.

is called upon to pay the debt by a specified day, or to be forever barred of the equity of redemption, is unknown to our laws.⁸ In *Gamut v. Gregg*,⁹ it is said that a strict foreclosure has no place in the Iowa system of procedure. Strict foreclosure in the English sense of the phrase is not allowed in

⁸ *McMillan v. Richards*, 9 Cal. 365, 411, 70 Am. Dec. 655. See *Goodenow v. Ewer*, 16 Cal. 461, 467, 76 Am. Dec. 540. In this case the court say: "In *McMillan v. Richards*, supra, we had occasion to consider the subject at great length, and to observe upon the diversity existing in the adjudged cases. We there asserted what had previously been held in repeated instances, the equitable doctrine as the true doctrine respecting mortgages, and have ever since applied it under all circumstances. *Johnson v. Sherman*, 15 Cal. 287, 76 Am. Dec. 481; *Clark v. Baker*, 14 Cal. 612, 76 Am. Dec. 449; *Koch v. Briggs*, 14 Cal. 256, 73 Am. Dec. 651; *Haffley v. Maier*, 13 Cal. 13; *Nagle v. Macy*, 9 Cal. 426. When, therefore, a mortgage is here executed, the estate remains in the mortgagor, and a mere lien or incumbrance upon the premises is created. The proceedings for a foreclosure of the equity of redemption, as those terms are understood where the common law view of mortgages is maintained, is unknown to our system, so far, at least, as the owner of the estate is concerned. The mortgagee can here, in no case, become the owner of the mortgaged premises, except by purchase upon a sale under a judicial decree consummated by conveyance. Proceedings in the nature of a suit to

foreclosure an equity of redemption, held by a subsequent incumbrancer, may undoubtedly be maintained by a purchaser under the decree, where such incumbrancer was not made a party to the original suit to enforce the mortgage. Such incumbrancer may be called upon to assert his right by virtue of his lien, and his equity of redemption, extending to the period provided by the statute of limitations, be thus reduced to the statutory period of six months. But the owner of the mortgaged premises, where a power of sale is not embraced in the mortgage, cannot, under any circumstances, be cut off from his estate, except by sale in pursuance of the decree of the court. See *Montgomery v. Tutt*, 11 Cal. 190; *Whitney v. Higgins*, 10 Cal. 547, 70 Am. Dec. 748, Cal. Practice Act, § 260. To give validity to such decree, the owner must be before the court when it is rendered. No rights which he possesses can otherwise be affected, and any direction for their sale would be unavailing for any purpose." See *McCaughey v. McDuffie*, 74 Pac. 751 (Cal.)

⁹ 37 Iowa, 573. It seems, however, that strict foreclosure will be allowed where a junior lienholder has not been made a party to the foreclosure of a prior mortgage. See *Shaw l. Heisey*, 48 Iowa, 468.

Florida,¹⁰ Indiana,¹¹ Kansas,¹² Missouri,¹³ Pennsylvania,¹⁴ or Tennessee.¹⁵ In Indiana, however, a proceeding in the nature of a strict foreclosure may be maintained by one who holds the legal title to the premises, as against persons who have a mere lien upon or a right of redemption in such premises;¹⁶ but such a remedy is not allowable by a mortgagee as against the person who holds the legal title to the land.¹⁷

In Montana where the mortgagor, after the maturity of the mortgage, gives the mortgagee permission to enter, the mortgagee may rightfully retain possession until the debt is paid.¹⁸ In New Hampshire the mortgagee's constructive possession, during the year following his foreclosing entry, is not actual, within the meaning of the statute of foreclosure, as against the mortgagee's second grantee, who has actual and exclusive possession, not subordinate in fact to any right of any other person, during the whole of the same year.¹⁹

§ 968. Illinois doctrine and practice.—In Illinois a strict foreclosure may be decreed, and generally will be, where the

¹⁰ *Browne v. Browne*, 17 Fla. 607, 623, 35 Am. Rep. 96.

¹¹ *Smith v. Brand*, 64 Ind. 427.

¹² *Blood v. Shepard*, 69 Kan. 752, 77 Pac. 565.

¹³ *O'Fallon v. Clopton*, 89 Mo. 284; *Davis v. Holmes*, 55 Mo. 349, 351. But see *Lewis v. Schwenn*, 93 Mo. 26, 3 Am. St. Rep. 511, 2 S. W. 391.

In *Missouri* a mortgagee, after forfeiture, may recover possession by ejectment without foreclosure. *Lewis v. Schwenn*, 93 Mo. 26, 3 Am. St. Rep. 511, 2 S. W. 391. After citing *Bush v. White*, 85 Mo. 339; *Buren v. Buren*, 79 Mo. 538; *Rogers v. Brown*, 61 Mo. 187; and *Hunter v. Hunter*, 50 Mo. 445, the court say: "From these decisions there can be no doubt but the statute does apply to mortgages."

¹⁴ *Winton's Appeal*, 87 Pa. St. 77.

¹⁵ *Hord v. James, v. Overt*. (Tenn.) 201.

¹⁶ *Jefferson v. Coleman*, 110 Ind. 515. See *Jackson v. Weaver*, 138 Ind. 539, 38 N. E. 166, *Loeb v. Tinken*, 124 Ind. 331, 24 N. E. 295. See also *Boyer v. Boyer*, 89 Ill. 447, 449; *Farrell v. Parlier*, 50 Ill. 275; *American Insurance Co. v. Gibson*, 104 Ind. 336; *Catterlin v. Armstrong*, 101 Ind. 258, 267; *Shirk v. Andrews*, 92 Ind. 509; *Smith v. Brand*, 64 Ind. 427; *Shaw v. Heisey*, 48 Iowa, 468; *Bolles v. Duff*, 43 N. Y. 469.

¹⁷ *Jefferson v. Coleman*, 110 Ind. 515.

¹⁸ *Fee v. Swingly*, 6 Mont. 596, 13 Pac. 375.

¹⁹ *Bartlett v. Sanborn*, 64 N. H. 70, 6 Atl. 486.

premises are not worth the face of the mortgage and the mortgagor is insolvent,²⁰ or where the interests of both parties seem to require it.²¹

But where the amount which the owner of the equity of redemption is required to pay to redeem from a foreclosure sale, is less than the value of the property, a strict foreclosure cannot be maintained; and under the practice in Illinois,²² a strict foreclosure of a mortgage should not be decreed, as a general rule, when there are junior incumbrances upon the property, or junior creditors or claimants of the equity of redemption.²³ And where the estate of a deceased mortgagor is insolvent, that fact, as well as the descent of the equity of redemption to infant heirs, would seem to require the usual procedure of an equitable action.²⁴

But a court of equity will not sacrifice or endanger the rights of a mortgagee holding the oldest and preferred lien and the best equity, for the bare possibility of a wholly improbable benefit to one having a second lien and a subordinate equity. In a recent case²⁵ the court say: "We do not understand the rule in this state to be that a strict foreclosure will in no case and under no circumstances be allowed where there are other creditors, or other incumbrances upon the mortgaged property, or purchasers of the equity of redemption. It is undoubtedly true that the general rule is, that a strict foreclosure will not be permitted where there is such a creditor, purchaser, or incumbrancer; but in our view there are exceptions to the general rule."

A final decree in strict foreclosure expressly providing that in default of payment all the right, title and interest, both legal

²⁰ *Stephens v. Bichnell*, 27 Ill. 444, 81 Am. Dec. 242.

²¹ *Johnson v. Donnell*, 15 Ill. 97; *Illinois Starch Co. v. Ottawa Hydraulic Co.* 23 Ill. App. 272, aff'd 125 Ill. 237, 17 N. E. 486.

²² *Gorham v. Farson*, 119 Ill. 425.

²³ *Illinois Starch Co. v. Ottawa*

Hydraulic Co. 125 Ill. 237, 17 N. E. 486; *Boyer v. Boyer*, 89 Ill. 447.

²⁴ *Boyer v. Boyer*, 89 Ill. 447.

²⁵ *Illinois Starch Co. v. Ottawa Hydraulic Co.* 20 Ill. App. 457, affirmed in 123 Ill. 227, 13 N. E. 201.

and equitable, of defendants, shall be vested absolutely and forever unconditionally in the complainants, is sufficient to make a complete transfer of the title, although under the English practice the title is not completely transferred until a final order based on proof that the money was not paid according to the terms of the decree.²⁶ A strict foreclosure may be decreed in Illinois wherever it is made to appear that the property affords but scant payment to a mortgagee, is deteriorating in value, and is standing idle and the mortgage indebtedness is increasing.²⁷

The Illinois court of appeals, in the case of *Decker v. Patton*,²⁸ say that the fact that failure to perform the conditions may make a bill to redeem operate as a strict foreclosure will not make such bill subject to the rule against strict foreclosure, where third persons are interested in the property as purchasers or incumbrancers.

§ 969. **New York doctrine and practice.**—In New York, the usual practice is to order a sale of the premises, as this is the most beneficial course for all parties. Actions for strict foreclosure are of rare occurrence, and are looked upon with disfavor by the courts, except in unusual cases where such an action is the only method by which complete justice can be rendered to all the parties in interest.²⁹

Thus, a purchaser under a statutory foreclosure is entitled to maintain an action for strict foreclosure as against the wife of a mortgagor,³⁰ or against a judgment creditor or a subsequent mortgagee or lienor who was not made a party to the statutory foreclosure, and whose rights were therefore not

²⁶ *Ellis v. Leek*, 127 Ill. 60, 20 N. E. 218, 3 L.R.A. 259.

²⁷ *Illinois Starch Co. v. Ottawa Hydraulic Co.* 125 Ill. 237, 17 N. E. 486.

²⁸ 20 Ill. App. 210, affirmed 120 Ill. 464, 11 N. E. 897.

²⁹ *Franklyn v. Haywood*, 61 How. (N. Y.) Pr. 43, 46; *Benedict v. Gilman*, 4 Paige Ch. (N. Y.) 58.

³⁰ *Ross v. Boardman*, 22 Hun (N. Y.) 527.

barred by the sale.³¹ As to such a person, a strict foreclosure is not only the proper, but it is thought to be the only remedy.³²

Strict foreclosure will not be granted to cut off the rights of a second mortgagee who was not made a party on foreclosure of the prior mortgage, at which the mortgagee was a purchaser, where the failure to make the second mortgagee a party was known before the decree, and leave was given by the court to make him a party to the action, but was not accepted.³³

§ 970. Has strict foreclosure been abolished by the Code in New York?—It is suggested that strict foreclosure has been abolished by the New York Code of Civil Procedure,³⁴ which requires that “in an action to foreclose a mortgage upon real property, if the plaintiff becomes entitled to final judgment, *it must direct the sale of the property mortgaged*, or of such part thereof as is sufficient to discharge the mortgage debt, the expenses of the sale, and the costs of the action.”

§ 971. Jurisdiction of court to decree a strict foreclosure in another state.—Where the parties are within the jurisdiction of the courts of a state, and process is personally served upon the defendants within the state, an action may be maintained for strict foreclosure against lands in another

³¹ *Bolles v. Duff*, 43 N. Y. 469, 474, 10 Abb. (N. Y.) Pr. N. S. 399, 41 How. (N. Y.) Pr. 355.

³² *Bolles v. Duff*, 43 N. Y. 469, 474, 10 Abb. (N. Y.) Pr. N. S. 399, 41 How. (N. Y.) Pr. 355; *Blanco v. Foote*, 32 Barb. (N. Y.) 535; *Franklyn v. Haywood*, 61 How. (N. Y.) Pr. 46; *Ross v. Boardman*, 22 Hun (N. Y.) 527; *Kendall v. Tredwell*, 14 How. (N. Y.) Pr.

165; *Benedict v. Gilman*, 4 Paige Ch. (N. Y.) 58; *Goodenow v. Ewer*, 16 Cal. 461, 76 Am. Dec. 540; *Shaw v. Heisey*, 48 Iowa, 468.

³³ *Moulton v. Cornish*, 138 N. Y. 133, 33 N. E. 842, 51 N. Y. S. R. 845, 20 L.R.A. 370.

³⁴ N. Y. Code Civil Proc. § 1626. See *Green v. Mussey*, 38 Misc. 287, 77 N. Y. Supp. 851.

state.³⁵ Thus, in *House v. Lockwood*,³⁶ an action was brought to procure a strict foreclosure of a mortgage given by the defendant upon lands in Cook county, Illinois, to secure the payment of a sum of money due to the plaintiff. The referee dismissed the complaint upon the ground that the court had no jurisdiction of the action, because the land was situated in another state. But the court held this to be error, because the parties were within the jurisdiction of the court when its process was served upon them, and had appeared and put in answers contesting the right of the plaintiff to maintain the action, and the court thereby acquired jurisdiction to entertain the suit and to grant the relief sought.³⁷

§ 972. **Parties to a strict foreclosure.**—The rules as to parties to a strict foreclosure are the same as those which govern equitable actions for the sale.³⁸ It has been said, however, that the plaintiff need not make those persons parties to the action whose rights have already been barred by a previous foreclosure;³⁹ but all persons interested in the mortgage, or in the mortgaged property, must be made parties to the suit.⁴⁰ Thus, the owner of the equity of redemption is a necessary defendant,⁴¹ and so are subsequent mortgagees.⁴²

The supreme court of Indiana, in the case of *Loeb v. Tink-*

³⁵ See 2 Story's Eq. Jur. (13th ed.) §§ 191, 192, 193.

³⁶ 40 Hun (N. Y.) 532, 1 N. Y. St. 196.

³⁷ In this case the court cited and applied *Cragin v. Lovell* 88 N. Y. 258; *Bolles v. Duff*, 43 N. Y. 469, 10 Abb. N. Y.) Pr. N. S. 399, 41 How. (N. Y.) Pr. 355; *Gardner v. Ogden*, 22 N. Y. 327, 78 Am. Dec. 192; *Bailey v. Ryder*, 10 N. Y. 363; *Lansing v. Goelet*, 9 Cow. (N. Y.) 346, 356; *Roblin v. Long*, 60 How. (N. Y.) Pr. 200; *Sutphen v. Fowler*, 9 Paige Ch. (N. Y.) 280; *Mitchell*

v. Bunch, 2 Paige Ch. (N. Y.) 606, 616, 617, 22 Am. Dec. 669; *Watts v. Waddle*, 31 U. S. (6 Pet.) 389, 400, 8 L. ed. 437, 442.

³⁸ *Benedict v. Gilman*, 4 Paige Ch. (N. Y.) 58.

³⁹ *Benedict v. Gilman*, 4 Paige Ch. (N. Y.) 58.

⁴⁰ *Lyon v. Sanford*, 5 Conn. 544.

⁴¹ *Goodenow v. Ewer*, 16 Cal. 461, 76 Am. Dec. 540.

⁴² *Weed v. Beebe*, 21 Vt. 495. See *Brooks v. Vermont Cent. R. Co.* 14 Blatchf. C. C. 463, 472, also *Goodman v. White*, 26 Conn. 317, 320.

ler,⁴³ say that a strict foreclosure may be had against persons who are not made parties to a suit to foreclose a mortgage, where they have only a right of redemption by reason of marital relations with purchasers at a sale on execution issued on a judgment junior to the mortgage. And the court of chancery of New Jersey, in the case of *Pettingill v. Hubbell*,⁴⁴ say that a purchaser at a foreclosure sale of a portion of the mortgaged premises need not make the persons interested in the remaining lands parties to a bill for strict foreclosure against a defendant who purchased the same portion of the mortgaged premises from an owner of the whole premises, and, by mistake, was not made a party to the foreclosure suit.

§ 973. Who may maintain a strict foreclosure.—It is thought that strict foreclosure cannot be maintained upon real property, except by one having the record title thereto.⁴⁵ And it has been said that strict foreclosure of a mortgage cannot be had in favor of a mortgagee who purchased at a sale under foreclosure, against the holder of a sheriff's deed on execution sale against the mortgagor prior to the commencement of the foreclosure suit, who was not made a party to such suit.⁴⁶ The supreme court of Missouri, in the case of *Lewis v. Schwenn*,⁴⁷ say that a mortgagor, after forfeiture, may recover possession by ejectment without foreclosure.

In some states, however, a mortgagee may obtain an ejectment on the mortgage against the mortgagor for a condition broken; so may a grantee in a deed absolute in form given as security for a debt.⁴⁸ And a second mortgagee may maintain

⁴³ 124 Ind. 331, 24 N. E. 235.

⁴⁴ 32 Atl. 76.

⁴⁵ *Backus v. Burke*, 48 Minn. 260, 51 N. W. 284. See *Burke v. Baldwin*, 51 Minn. 181, 53 N. W. 460; *Burke v. Backus*, 51 Minn. 174, 53 N. W. 458.

⁴⁶ *Jackson v. Weaver*, 138 Ind. 539, 38 N. E. 166.

⁴⁷ 93 Mo. 26, 3 Am. St. Rep. 511, 2 S. W. 391.

⁴⁸ *Finlon v. Clark*, 118 Ill. 32; *Williams v. Hilton*, 35 Me. 547, 58 Am. Dec. 729.

an action against the first mortgagee and against the owner of the equity of redemption.⁴⁹

In Louisiana, the holder of a mortgage with the pact *de non alienando*, who has proceeded against the mortgagor *via ordinaria* and recovered a judgment for his debt, with recognition of his mortgage, has the right to issue a *fieri facias* on such judgment and to seize the mortgaged property regardless of alienations, which are inoperative against such a mortgage, and without notice to or process against the third possessor.⁵⁰ But it is thought that judgment creditors holding liens on mortgaged premises have no option as to whether there shall be a strict foreclosure of the mortgage or a sale, where the bond has been discharged, the owner of the equity of redemption has surrendered it to the mortgagee, and the latter simply holds the mortgage as a muniment of title.⁵¹

It is said, in the case of *Dohm v. Haskins*,⁵² that a sale by advertisement under a mortgage, by an assignee whose assignment is not so acknowledged as to be entitled to record, is void under the Michigan statute regulating foreclosure by advertisement, and requiring both the mortgage and assignments to be recorded, although such assignment is in fact recorded.

Where a bill in equity is brought for a strict foreclosure after the death of the mortgagee, his heirs at law are necessary parties plaintiff, because in such a case the decree vests the legal title to the premises in the heirs, and not in the personal representatives.⁵³

§ 974. **Strict foreclosure against infants.**—In a strict foreclosure against an infant, he is entitled to have his day in court after he becomes of age, to show any error in the decree; but if there is no error, he will be bound by the de-

⁴⁹ *Cochran v. Godell*, 131 Mass. 464.

⁵⁰ *Levy v. Lake*, 43 La. An. 1034, 10 So. 375.

⁵¹ *Lockard v. Hendrickson* (N. J. Ch.) 25 Atl. 512.

⁵² 88 Mich. 144, 50 N. W. 108.

⁵³ *Osborne v. Tunis*, 25 N. J. L. (1 Dutch) 633.

cree.⁵⁴ This rule is based on the ancient and well settled principle, that no decree should be rendered against an infant without giving him an opportunity, on coming of age, to show cause against it. The time usually allowed is six months, and the infant is entitled to the process of the court for that purpose on coming of age.⁵⁵

For this reason, it is thought that instead of ever seeking a strict foreclosure of a mortgage against an infant heir of the mortgagor, it is safer to obtain a decree for the sale of the mortgaged premises, because a decree of sale will be binding upon the infant from the time it is granted.⁵⁶

§ 975. Pleadings in a strict foreclosure.—In an action for strict foreclosure, the pleadings and practice are substantially the same as they are in the equitable action for foreclosure and sale.⁵⁷ The specific remedy desired should be demanded in the prayer of the complaint; but this is not indispensable, because in an action for foreclosure, if the complaint is drawn in the ordinary form, and it appears in the progress of the cause, that it is desirable, a sale may be ordered, although a strict foreclosure may be prayed for, and *vice versa*.⁵⁸

§ 976. Judgment in a strict foreclosure.—The judgment in a strict foreclosure should require the persons entitled to redeem to do so within a specified time; in default of such redemption, the title should be decreed to vest absolutely in the plaintiff.⁵⁹ Until the expiration of the time limited in

⁵⁴ *Mills v. Dennis*, 3 Johns. Ch. (N. Y.) 367; *Houston v. Aycock*, (5 Sneed.) Tenn. 406, 3 Am. Dec. 131.

⁵⁵ *Mills v. Dennis*, 3 Johns. Ch. (N. Y.) 367; *McClellan v. McClellan*, 65 Me 508; *Whitney v. Stearnes*, 52 Mass. (11 Metc.) 319; *Coffin v. Heath*, 47 Mass. (6 Metc.) 76; *Chandler v. McKinney*, 6 Mich. 217, 74 Am. Dec. 286; *Dow v.*

Jewell, 21 N. H. 470, 487; *Long v. Mumford*, 17 Ohio St. 506, 93 Am. Dec. 638.

⁵⁶ *Mills v. Dennis*, 3 Johns. Ch. (N. Y.) 367.

⁵⁷ *Kendall v. Treadwell*, 5 Abb. (N. Y.) Pr. 16, 14 How. (N. Y.) Pr. 165.

⁵⁸ *Sage v. McLaughlin*, 34 Wis. 550.

⁵⁹ *Kendall v. Treadwell*, 5 Abb.

the judgment of strict foreclosure for the payment of the mortgage debt, the mortgage will not be foreclosed and the title will not pass to the plaintiff.⁶⁰

The court of chancery of New Jersey, in the case of *Pettin-gill v. Hubbell*,⁶¹ say that on a bill for strict foreclosure brought by a purchaser at foreclosure sale of a portion of the mortgaged premises against a defendant who purchased the same portion from an owner of the entire premises and who was not made a party to the foreclosure suit, the court will determine upon the proofs the amount of the mortgage properly chargeable against the portion owned by the defendant. The supreme court of New York, in the case of *Moulton v. Cornish*,⁶² hold that on denial of strict foreclosure to cut off a second mortgage, the ordinary decree of foreclosure may be allowed if necessary parties are brought in.

§ 977. **Time for redemption.**—The period allowed for redemption should be fixed by the court in the exercise of its sound discretion;⁶³ it may be enlarged from time to time, on application, and on satisfactory reasons being shown therefor.⁶⁴ The time usually allowed for redemption is six months.⁶⁵

Courts are very liberal in strict foreclosures in extending and enlarging, from time to time, the period allowed for redemption; but in actions to redeem, such leniency is not in-

(N. Y.) Pr. 16, 14 How. (N. Y.) Pr. 165; *Waters v. Hubbard*, 44 Conn. 340; *Farrell v. Parlier*, 50 Ill. 274; *Koerner v. Willamette Iron Works*, 36 Or. 90, 78 Am. St. Rep. 759, 58 Pac. 863. See *Sage v. Iowa Cent. R. Co.* 99 U. S. (9 Otto), 334, 25 L. ed. 394.

⁶⁰ *Bolles v. Duff*, 43 N. Y. 469.

⁶¹ 32 Atl. 76.

⁶² 138 N. Y. 133, 33 N. E. 842, 51 N. Y. S. R. 845, 20 L.R.A. 370.

⁶³ *Bolles v. Duff*, 43 N. Y. 469; *Blanco v. Foote*, 32 Barb. (N. Y.) Mortg. Vol. II.—86.

535; *Perine v. Dunn*, 4 Johns. Ch. (N. Y.) 140; *McKinstry v. Mervin*, 3 Johns. Ch. (N. Y. 466 n; *Johnson v. Donnell*, 15 Ill. 97; *Clark v. Reyburn*, 75 U. S. (8 Wall.) 318 19 L. ed. 354.

⁶⁴ *Perine v. Dunn*, 4 Johns. Ch. (N. Y.) 140; *Downing v. Pal-mateer*, 1 T. B. Mon. (Ky.) 64, 66 *Quarles v. Knight*, 8 Price, 630; *Monkhouse v. Corporation of Bedford*, 17 Ves. 380.

⁶⁵ *Perine v. Dunn*, 4 Johns. Ch. (N. Y.) 140; *McKinstry v. Mervin*,

dulged, and the party seeking redemption is required to redeem within the time appointed.⁶⁶

§ 978. Setting aside and opening strict foreclosure.—

A decree of strict foreclosure may be opened and set aside the same as a decree of foreclosure and sale in an equitable action, and for many of the same causes.⁶⁷ After a decree of foreclosure has been entered, the conduct of the parties may be such as to waive, or open the decree; as by treating the debt as still due,⁶⁸ or by paying a part of it,⁶⁹ or by agreeing that the foreclosure shall be null and void.⁷⁰

Usually, the opening of a decree of strict foreclosure depends upon equitable considerations affecting the rights of the parties, and not upon the regularity of the proceedings.⁷¹ Where a mortgagee supposed that he had made a valid tender within the time limited, which was not good by reason of some informality, the decree of strict foreclosure will be opened;⁷² and if the failure to pay the amount directed to be paid, within the time allowed, is due to overtures for a settlement made by the plaintiff, the decree of foreclosure will be opened.⁷³ Where a mortgagor who had paid part of the mortgage debt, was prevented by an unavoidable calamity, from paying the balance, until a short time after the day designated for such pay-

3 Johns. Ch. (N. Y.) 466 n; *Barnes v. Lee*, 1 Bibb (Ky.) 526; *Harkins v. Forsyth*, 11 Leigh (Va.) 294; *Edwards v. Cunliffe*, 1 Madd. Ch. 287; *Monkhouse v. Corporation of Bedford*, 17 Ves. 380, 407.

⁶⁶ *Brinckerhoff v. Lansing*, 4 Johns. Ch. (N. Y.) 65, 8 Am. Dec. 538; *Perine v. Dunn*, 4 Johns. Ch. (N. Y.) 140; *Harkins v. Forsyth*, 11 Leigh (Va.) 294; *Chicago & V. R. Co. v. Fosdick*, 106 U. S. (16 Otto), 70, 27 L. ed. 55.

⁶⁷ See *ante*, chap. xxvi.

⁶⁸ *Bissell v. Bosman*, 2 Dev. (N. C.) Eq. 154.

⁶⁹ *Gilson v. Whitney*, 51 Vt. 552; *Smalley v. Hickok*, 12 Vt. 153; *Converse v. Cook*, 8 Vt. 164.

⁷⁰ *Gristwold v. Mather*, 5 Conn. 435.

⁷¹ *Bridgeport Sav. Bank v. El-dredge*, 28 Conn. 556, 73 Am. Dec. 688.

⁷² *Crane v. Hanks*, 1 Root (Conn.) 468.

⁷³ *Pierson v. Clayes*, 15 Vt. 93.

ment, when he tendered the amount due, the foreclosure was opened.⁷⁴

Where proper service has not been made on the defendants, a strict foreclosure may be set aside on application.⁷⁵ In making an application, the party must tender the mortgage debt, or show his readiness to pay it, in order to secure the relief desired.⁷⁶

It is held that, under the Maine statute,⁷⁷ a mortgage is not effectually foreclosed by peaceably and openly taking possession in the presence of two witnesses, should the witnesses fail to state in their certificate the time of the entry,⁷⁸ and the foreclosure may be opened or set aside for irregularity.

⁷⁴ *Crane v. Hanks*, 1 Root (Conn.) 468.

⁷⁵ *Fall v. Evans*, 20 Ind. 210; *Mitchell v. Gray*, 18 Ind. 123.

⁷⁶ *Hatch v. Garza*, 7 Tex. 60.

⁷⁷ Me Rev. Stat. c. 90, § 3, cl. 3.

⁷⁸ *Snow v. Pressey*, 82 Me. 552. 20 Atl. 78.

CHAPTER XXXVI.

FEES, COSTS AND DISBURSEMENTS.

FEES OF REFEREE SELLING—COSTS IN GENERAL—WHEN DISCRETIONARY—WHO MAY HAVE—PRIOR AND JUNIOR LIENORS—GUARDIAN AD LITEM—STIPULATION FOR COUNSEL FEE—STATUTORY FORECLOSURE—COSTS IN DISTRIBUTING SURPLUS.

- § 979. Fees of officer conducting sale.
- § 980. Fees of such officer statutory.
- § 981. Appeal from order fixing fees of referee to **sell**.
- § 982. Costs in general.
- § 983. Costs in equitable actions to foreclose.
- § 984. Costs where guarantor of mortgage deceased.
- § 985. Costs of foreclosure in discretion of court.
- § 986. Costs under New York Code of Civil Procedure.
- § 987. Exceptions to discretion of court in allowing costs.
- § 988. Who may recover costs.
- § 989. Prior mortgagee entitled to costs.
- § 990. Costs to subsequent incumbrancers.
- § 991. Costs on two foreclosures against same **property**.
- § 992. When costs not allowed to mortgagee.
- § 993. When costs not allowed to defendants.
- § 994. Notice of no personal claim.
- § 995. Effect of excessive demand in the **complaint**.
- § 996. Effect of tender after action brought.
- § 997. Costs on default.
- § 998. Costs allowed guardian *ad litem*.
- § 999. Costs on appointment of receiver.
- § 1000. Costs on resale.
- § 1001. Who personally liable for costs.
- § 1002. Out of what fund costs payable.
- § 1003. Counsel fees in foreclosing mortgages.
- § 1004. Counsel fees in Kentucky and Michigan.
- § 1005. Stipulation for attorney's fee—When **usurious**.
- § 1006. Allowance of attorney's fee—Discretion of court.
- § 1007. Allowance of attorney's fee a matter of contract **or statute**.
- § 1008. Enforcement of counsel fee against purchaser.
- § 1009. Allegation as to counsel fee.
- § 1010. When attorney's fee not allowed.

- § 1011. Costs on redeeming.
- § 1012. Foreclosure under power—Mortgagee's compensation.
- § 1013. Expenses and disbursements of trustee.
- § 1014. Taxing costs and disbursements on foreclosure by advertisement.
- § 1015. What disbursements allowed.
- § 1016. Who may require taxation of costs and disbursements.
- § 1017. Costs in surplus proceedings.
- § 1018. Who entitled to costs in surplus proceedings.
- § 1019. Who chargeable with costs in surplus proceedings.
- § 1020. Disbursements in surplus proceedings.
- § 1021. Same—Expenses for search—Unofficial search.
- § 1022. Interest on advancements.
- § 1023. Interest on costs.

§ 979. Fees of officer conducting sale.—The New York Code of Civil Procedure provides,⁷⁹ that “the fees of a referee appointed to sell real property pursuant to a judgment in an action, are the same as those allowed to the sheriff; and he is also allowed the same disbursements as the sheriff.”⁸⁰ Where a referee is required to take security upon a sale, or to distribute, or apply, or ascertain and report upon the distribution or application of, any of the proceeds of the sale, he is also entitled to one-half of the commissions upon the amount so secured, distributed, or applied, allowed by law to an executor or administrator for receiving and paying out money. But commissions shall not be allowed to him upon a sum bidden by a party, and applied upon that party's demand, as fixed by the judgment, without being paid to the referee, except to the amount of ten dollars. And a referee's compensation, including commissions, cannot, where the sale is under a judgment, in an action to foreclose a mortgage, exceed fifty dollars, unless the property sold for ten thousand dollars or upwards, in which event the referee may receive such additional compensation as to the court may seem proper, or in any other case five hundred dollars.⁸¹

⁷⁹ N. Y. Code Civ. Proc. § 3297.

⁸⁰ As to the fees allowed to a sheriff, see N. Y. Code Civ. Proc. § 3307.

⁸¹ N. Y. Code Civ. Proc. § 3297; *Race v. Gilbert*, 102 N. Y. 298; *Schermerhorn v. Prouty*, 80 N. Y. 317, 21 Alb. L. J. 275; *Maher v.*

The supreme court of Maryland, in the case of *Johnson v. Glenn*,⁸² say that commissions to the mortgagee or his assignee for the sale of the mortgaged property in case of default, are not included in the words "all expenses incident to such sale" in the direction in the mortgage that the proceeds of sale be first applied to such expenses.

§ 980. Fees of such officer statutory.—It has always been the policy of the law to prescribe and fix the compensation which may be demanded for the performance of legal duties by public officers. And where no provision is made, either directly or indirectly, no fees can be lawfully demanded. Costs and fees are recoverable by virtue of statutory authority only, and where no such authority exists, no claim for their recovery can be maintained.⁸³

A referee for selling real estate, can recover no more than the fees prescribed by statute, although there may be an express agreement between the parties to pay a larger sum.⁸⁴ No fees can be allowed to an auctioneer for services upon the adjournment of a sale by a referee.⁸⁵

O'Conner, 61 How. (N. Y.) Pr. 103; *Walbridge v. James*, 16 Hun (N. Y.) 8; *Harrington v. Bayles*, 40 Misc. 388, 82 N. Y. Supp. 379. See *Daby v. Jacot*, 2 Abb. (N. Y.) N. C. 97; *Richards v. Richards*, 2 Abb. (N. Y.) N. C. 93; *Innes v. Purcell*, 2 T. & C. (N. Y.) 538, 1 Hun (N. Y.) 318; *Metropolitan Life Ins. Co. v. Bendheim*, 59 N. Y. Supp. 793; *Dime Savings Bank v. Pettit*, 59 N. Y. Supp. 794. See also *Hover v. Hover*, 25 Misc. 95, 54 N. Y. Supp. 693. The act (chap. 569, Laws 1869, as amended by chap. 192, Laws 1874) in relation to the fees of sheriffs and referees, on foreclosure sales in the city and county of New York, was not re-

pealed by the amendment of 1876 to § 309 of the Code of Procedure, which limits the sum to be allowed as fees on such a sale. The amendment simply modifies the act by fixing the maximum of fees, leaving the scale of charges up to that limit as fixed by said act. *Schermerhorn v. Prouty*, 80 N. Y. 317, 21 Alb. L. J. 275.

⁸² 80 Md. 369, 30 Atl. 993.

⁸³ *Innes v. Purcell*, 2 T. & C. (N. Y.) 538, 539, 1 Hun (N. Y.) 318. See *Downing v. Marshall*, 37 N. Y. 380.

⁸⁴ *Brady v. Kingsland*, 5 N. Y. Civ. Proc. Rep. 413.

⁸⁵ *Ward v. James*, 8 Hun (N. Y.) 526.

It has been held, in the case of *Lockwood v. Fox*,⁸⁶ that chapter 569, of New York laws of 1869, as amended by chapter 192, of the laws of 1874, not having been repealed, is by virtue of section 3308 of the Code of Civil Procedure, still in force, and that the fees of a referee to sell, on a foreclosure in the city and county of New York, must be taxed thereunder.

§ 981. Appeal from order fixing fees of referee to sell.—Under section 1296 of the Code, a referee appointed to sell real estate in pursuance of a judgment, may appeal from an order fixing his fees and compensation.⁸⁷ An order making an allowance to a referee appointed to conduct the sale under a decree of foreclosure, which charges the owner of the equity of redemption with the payment of a definite sum of money, which is greater than he or his property can lawfully be charged with, affects a substantial right, and is appealable when made in a summary application for judgment.⁸⁸

§ 982. Costs in general.—In actions at law, the rule seems to be well settled, both in England and in this country, that the prevailing party is entitled to costs, although he may recover only a part of his demand; this rule has been established by statute in many states.⁸⁹ A debtor may, however, by offering to confess judgment for a certain amount, become entitled to costs accruing subsequently to his offer, provided his creditor fails to recover more than the amount offered.⁹⁰

In suits in equity, however, the allowance, or disallowance, of costs depends largely on the circumstances of each par-

⁸⁶ 1 N. Y. Civ. Proc. Rep. 407.

⁸⁷ *Hobart v. Hobart*, 23 Hun (N. Y.) 484.

⁸⁸ *Innes v. Purcell*, 2 T. & C. (N. Y.) 538, 1 Hun (N. Y.) 318. See *People v. New York Cent. R. Co.* 29 N. Y. 418, 422.

⁸⁹ *Wood v. Brown*, 6 Daly (N. Y.) 428; *St. Charles v. O'Mailey*, 18

Ill. 407; *Brandies v. Stewart*, 1 Met. (Ky.) 395; *Underwood v. Lacapere*, 14 La. An. 274; *Wall v. Covington*, 76 N. C. 150; *Little v. Lockman*, 5 Jones (N. C.) L. 433; *McReynolds v. Cates*, 7 Humph. (Tenn.) 29. See *Brown v. Skotland as adm'r.* etc. 12 N. D. 445, 97 N. W. 543.

⁹⁰ *Bathgate v. Haskins*, 63 N. Y.

ticular case, and rests entirely within the discretion of the court, to be exercised upon equitable principles and with reference to the general rules of practice. *Prima facie*, the successful party is entitled to costs, and it is incumbent upon the defeated party, if there are just reasons why he should not pay a bill of costs, to show such circumstances as would overcome the presumptive right of the successful party; if it is shown that it would be unjust to compel the defeated party to pay costs, the court may, in the exercise of its sound discretion, refuse costs to either party, or it may even impose them upon the successful party.⁹¹

In *Clark v. Reed*,⁹² Putnam, J., in delivering the opinion of the court, stated the general practice in equity, with his usual accuracy, as follows: "We adopt the general rule, that the prevailing party is to have costs, as applicable to suits in equity as well as at law. It will be applied, unless the losing party can show that equity requires a different judgment. If it should appear that the plaintiff had good reason to think the respondent was liable upon equitable principles to pay

261; *O'Conner v. Arnold*, 53 Ind. 203; *Rucker v. Howard*, 2 Bibb. (Ky.) 166, 169; *Building Assoc. v. Crump*, 42 Md. 192; *Holden v. Kynaston*, 2 Beav. 204, 206.

⁹¹*Eldridge v. Strenz*, 39 N. Y. Supr. Ct. (7 J. & S.) 295; *Belmont v. Ponvert*, 38 N. Y. Supr. Ct. (6 J. & S.) 425; *Robinson v. Cropsey*, 2 Edw. Ch. (N. Y.) 138; *Travis v. Waters*, 12 Johns. (N. Y.) 500; *Glen v. Fisher*, 6 Johns. Ch. (N. Y.) 33, 10 Am. Dec. 310; *Methodist Church v. Jaques*, 1 Johns. Ch. (N. Y.) 65; *Gray v. Gray*, 15 Ala. 779; *Temple v. Lawson*, 19 Ark. 148; *Cowles v. Whitman*, 10 Conn. 121, 25 Am. Dec. 60; *Pearce v. Chastain*, 3 Ga. 226, 46 Am. Dec. 423;

McArtee v. Engart, 13 Ill. 242; *Frisby v. Ballance*, 5 Ill. (4 Scam.) 287, 39 Am. Dec. 409; *Stone v. Locke*, 48 Me. 425; *Lee v. Pindle*, 12 Gill. & J. (Md.) 288; *Clark v. Reed*, 28 Mass. (11 Pick.) 449; *Carpenter v. Easton & A. R. R. Co.* 28 N. J. Eq. (1 Stew.) 390; *Decker v. Caskey*, 3 N. J. Eq. (2 H. W. Gr.) 446; *Hess v. Beates*, 78 Pa. St. 429; *Massing v. Ames*, 38 Wis. 285; *Pennsylvania v. Wheeling & Belmont Bridge Company*, 59 U. S. (18 How.) 421, 15 L. ed. 435; *Brooks v. Byam*, 2 Story C. C. 553; *Hunter v. Marlboro*, 2 Woodb. & Min. C. C. 168; *Vancouver v. Bliss*, 11 Ves. 462.

⁹²28 Mass. (11 Pick.) 449.

money, to perform specific contracts, or to make discovery, and it should, upon hearing of the answer, appear that no such cause existed, as the plaintiff had reason to suppose did exist, the court would not award costs against him, if it appeared that the respondent was in such a situation as to render it probable that he was amenable to the call of the plaintiff upon equitable principles. On the other hand, if it should appear that the plaintiff knew the whole ground and made a claim in equity, which was successfully resisted by the respondent, it would seem that costs should be allowed as well in equity as at law. The mere change of the forum should not in reason make any difference in the question of costs."

§ 983. **Costs in equitable actions to foreclose.**—The mortgagee in a foreclosure, like the plaintiff in other actions, is generally entitled to a bill of costs, if he prevails and obtains a decree of sale.⁹³ But all costs and fees are, as a rule, statutory;⁹⁴ and where no statutory right to charge or allow them exists, no legal or equitable right to do so can be presumed.⁹⁵

Where the facts alleged and proved entitle the plaintiff to costs, a judgment rendered for costs will not be reversed or set aside merely because the plaintiff did not ask for costs in his complaint;⁹⁶ the established practice, however, requires the successful party to apply by motion for his costs, or to demand them in some manner.⁹⁷ And where the court of appeals reverses a judgment, "with costs to abide the event,"

⁹³ *Benedict v. Gilman*, 4 Paige Ch. (N. Y.) 58; *Concklin v. Codding-ton*, 12 N. J. Eq. (1 Beas.) 250, 72 Am. Dec. 393; *Wetherell v. Collins*, 3 Madd. 255; *Bartle v. Wilkin*, 8 Sim. 238; *Loftus v. Swift*, 2 Sch. & Lef. 642.

⁹⁴ *Ward v. James*, 8 Hun (N. Y.) 526.

⁹⁵ *Ward v. James*, 8 Hun (N. Y.) 526. See *Downing v. Marshall*,

37 N. Y. 380, 80 Am. Dec. 290; *Innes v. Purcell*, 2 T. & C. (N. Y.) 538, 1 Hun (N. Y.) 318.

⁹⁶ *Hces v. Nellis*, 1 T. & C. (N. Y.) 118, 121.

⁹⁷ *Chase v. Miser*, 67 Barb. (N. Y.) 441, 443; *Lanz v. Trout*, 46 How. (N. Y.) Pr. 94. See *Gray v. Hannah*, 3 Abb. (N. Y.) Pr. N. S. 183.

the party who finally succeeds can recover costs for all the different steps in the action.⁹⁸

In the case of *Bockes v. Hathorn*,⁹⁹ it was held that where an action on a bond and to foreclose a mortgage collateral thereto, is difficult and unusual, on account of a defence and trial, an additional allowance, not exceeding five per centum of the recovery, nor \$2,000 in the aggregate, may be granted to any party.

It is competent for the parties to a foreclosure action to stipulate regarding the costs of the action and the payment thereof, and such stipulation will be enforced in those cases where the interests of a third person are not affected injuriously.¹ Thus the supreme court of Louisiana, in the case of *Regan's Succession*,² say that a stipulation between a mortgagee and the executor of the mortgagor and his counsel, that he will not foreclose, but will permit the executor to sell the mortgaged property on credit, provided the executor and his counsel will not charge commissions or fees upon the proceeds, when plain and unambiguous, and free from fraud or error, will be enforced, and such fees stricken out on an accounting.

The supreme court of South Carolina, in the case of the *American Freehold Land Mortgage Company v. Moody*,³ say

⁹⁸ *Newcomb v. Hale*, 4 N. Y. Civ. Proc. Rep. 25, 27. See *First Nat. Bank of Meadville v. Fourth Nat. Bank of New York*, 84 N. Y. 469; *Donovan v. Vandermark*, 22 Hun (N. Y.) 307; *Saunders v. Townshend*, 63 How. (N. Y.) Pr. 343.

⁹⁹ 17 Hun (N. Y.) 87, distinguishing *Hunt v. Chapman*, 62 N. Y. 333, N. Y. Code Civ. Proc. §§ 3252, 3253.

For effect of amendment of 1898 on Code § 3253, see *Long Island Loan & Trust Co. v. Long Island City & Newton R. R. Co.* 85 App.

Div. 36, 82 N. Y. Supp. 644. See *Waterbury as ex'r, etc. v. Tucker & Carter Cordage Co.* 152 N. Y. 610, 46 N. E. 959; *Badger v. Johnston*, 106 App. Div. 237, 94 N. Y. Supp. 421.

Real property in § 3253 does not include a leasehold estate. *Barnes v. Meyer*, 41 N. Y. Supp. 210.

¹ *Cook v. Gilchrist*, 82 Iowa, 277, sub nom. *Cook v. Shorthill*, 48 N. W. 84. See *Post*, § 1007.

² 43 La. An. 723, 9 So. 753.

³ 40 S. C. 187, 18 S. E. 677.

that the costs of an action are required to be first paid out of the proceeds of the whole property in those cases where the decree in foreclosure to which a second mortgagee and judgment creditors of the mortgagor are parties, holding the mortgagor entitled to a homestead, and providing that the mortgages are to be first paid out of the homestead, and the judgments out of the remainder of the property in the order of their priority; and further providing that out of the proceeds of the sale the sheriff pay, first, the costs of the action and expenses of the sale, and, next, to the plaintiff the amount of the mortgage debt and interest, which leaves a balance less than the amount of the second mortgage; and further providing that out of the remainder of the proceeds of sale, exclusive of costs and expenses, the sheriff pay the second mortgagee the amount of his debt, not to exceed as to both mortgagees the sum regarded as the homestead, in exoneration of the property of the defendant in excess of the homestead, requires the costs of the action to be first paid out of the proceeds of the whole property.

In those cases where the mortgage contains a stipulation for attorney's fees in case the mortgage is placed in the hands of an attorney for foreclosure, which is done and proceedings commenced, the mortgagor cannot stop foreclosure without paying the attorney's fees.⁴ But the neglect of the mortgagee to file an affidavit of costs and disbursements as required by statute,⁵ cannot affect the validity of a sale under the power in the mortgage.⁶

The supreme court of Illinois, in the case of Cheltenham Improvement Company v. Whitehead,⁷ say that a trustee foreclosing a trust deed is not warranted in paying the cost of an abstract of title, under a provision in the deed author-

⁴ *Mjones v. Yellow Medicine Co.*
Bk. 45 Minn. 335, 47 N. W. 1072.
See *Post*, §§ 1003, 1007.

⁵ Minn. Gen. Stat. 1878, c. 81, § 23.

⁶ *Johnson v. Cocks*, 37 Minn. 530,
35 N. W. 436.

⁷ 128 Ill. 279, 21 N. E. 569.

izing him, in case of foreclosure, to pay certain specified claims, "also all other expenses of the trust."

§ 984. Costs where guarantor of mortgage deceased.—In proceedings to sell the real estate of a deceased guarantor of a mortgage, the costs of foreclosure cannot be considered as a part of the debt, yet as they are incidental to the endeavor to collect the same out of the premises, the amount to be credited on the debt is the proceeds realized from the foreclosure, after deducting the costs.⁸ A surety has no equity to demand that so much money as is necessary to pay the costs of collection, shall be withheld from that object and applied exclusively to satisfy the principal of the debt, for as the creditor is entitled to the whole amount, the expenses of collection are properly deductible from the sum realized from the principal debtor.

§ 985. Costs of foreclosure in discretion of court.—The allowance of costs in actions in equity is always in the discretion of the trial court,⁹ but the discretion to be exercised must be a reasonable and sound one.¹⁰ Their allowance, or disallowance, will always depend largely on the facts and circumstances of each particular case, and the discretion of the court is to be exercised without reference to the general rules of practice, but as equity may require.¹¹ Such discretion will

⁸ *Hurd v. Callahan*, 9 Abb. (N. Y.) N. C. 374.

⁹ *Garr v. Bright*, 1 Barb. Ch. (N. Y.) 157; *Methodist Episcopal Church v. Jaques*, 1 Johns. Ch. (N. Y.) 65; *Lyman v. Lyman*, 2 Paine C. C. 53. See *Mackey v. Cairns*, 5 Cow. (N. Y.) 575, 586, 15 Am. Dec. 477; *Demarest v. Wynkoop*, 3 Johns. Ch. (N. Y.) 129, 8 Am. Dec. 467; *Pendelton v. Eaton*, 3 Johns. Ch. (N. Y.) 69; *Murray v. Ballou*, 1 Johns. Ch. (N. Y.) 566; *Travis*

v. Waters, 1 Johns. Ch. (N. Y.) 89; *Nicoll v. Trustees of Huntington*, 1 Johns. Ch. (N. Y.) 166; *Cunningham v. Freeborn*, 11 Wend. (N. Y.) 258; *Pearce v. Chastain*, 3 Ga. 226, 46 Am. Dec. 423; *The Martha, Blatchf. & How*, D. C. 169.

¹⁰ *Eastburn v. Kirk*, 2 Johns. Ch. (N. Y.) 317. See *Law v. McDonald*, 9 Hun (N. Y.) 23.

¹¹ *Prima facie*, the prevailing party is entitled to costs, and it devolves upon the defeated party to

not be interfered with by an appellate court, except in cases of open abuse or gross error, or where it is exercised in disregard of recognized equitable principles.¹²

The matter of costs, in the several states, depends very much upon their statutes and practice, which are quite dissimilar. But as foreclosures are equitable actions in most states, the costs are generally within the discretion of the court.¹³ And, although there is no fixed rule for granting costs, as in courts of law, courts of equity rarely, if ever, refuse to allow them.¹⁴

In some states, as in Vermont,¹⁵ the chancellor may require the defendant to furnish security for costs, when his defense is an affirmative claim, such as payment of a mortgage debt.¹⁶

overcome such presumptive right. See *Atkinson v. Manks*, 1 Cow. (N. Y.) 691; *Canfield v. Morgan*, 1 Hopk. Ch. (N. Y.) 224; *Aymer v. Gault*, 2 Paige Ch. (N. Y.) 284; *Badeau v. Rogers*, 2 Paige Ch. (N. Y.) 209; *Gray v. Gray*, 15 Ala. 779; *Temple v. Lawson*, 19 Ark. 148; *Cowles v. Whitman*, 10 Conn. 121, 25 Am. Dec. 60; *McArtee v. Engart*, 13 Ill. 243; *Frisby v. Ballance*, 5 Ill. (4 Scam.) 287, 34 Am. Dec. 409; *Clark v. Reed*, 28 Mass. (11 Pick.) 449; *Saunders v. Frost*, 22 Mass (5 Pick.) 259, 16 Am. Dec. 395; *Farley v. Blood*, 30 N. H. 354; *Carpenter v. Easton & A. R. Co.* 28 N. J. Eq. (1 Stew.) 392; *Decker v. Caskey*, 3 N. J. Eq. (2 H. W. Gr.) 446; *Hess v. Beates*, 78 Pa. St. 429; *Manchester P. W. v. Stimpson*, 2 R. I. 415; *Pennsylvania v. Wheeling & B. B. Co.* 59 U. S. (18 How.) 421, 15 L. ed. 435; *Spring v. South Carolina Ins. Co.* 21 U. S. (8 Wheat.) 268, 5 L. ed. 614; *Hunter v. Marlboro*, 2 Woodb. &

Min. C. C. 168; *Aldrich v. Thompson*, 2 Bro. Ch. 149.

¹² *Morris v. Wheeler*, 45 N. Y. 708; *Barker v. White*, 1 Abb. App. Dec. (N. Y.) 95; *House v. Eisenlord*, 30 Hun (N. Y.) 90, 92.

¹³ *Garr v. Bright*, 1 Barb. Ch. (N. Y.) 157; *O'Hara v. Brophy*, 24 How. (N. Y.) Pr. 379; *Bartow v. Cleveland*, 16 How. (N. Y.) Pr. 364, 7 Abb. (N. Y.) Pr. 339; *Pratt v. Ramsdell*, 16 How. (N. Y.) Pr. 59, 7 Abb. (N. Y.) Pr. 340n; *Lossee v. Ellis*, 13 Hun (N. Y.) 655; *Gallagher v. Egan*, 2 Sandf. (N. Y.) 742; *Williams v. Williams*, 117 Wis. 125, 94 N. W. 25; *Irvine v. Perry*, 119 Cal. 352, 51 Pac. 544; *House v. Eisenlord*, 102 N. Y. 713, 7 N. E. 428.

¹⁴ *Garr v. Bright*, 1 Barb. Ch. (N. Y.) 157; *Eastburn v. Kirk*, 2 Johns. Ch. (N. Y.) 317; *Stevens v. Veriane*, 2 Lans. (N. Y.) 90.

¹⁵ Under Rev. Laws, § 713.

¹⁶ *Badger v. Taft*, 58 Vt. 585, sub nom. *Badger v. Shaw*, 3 Atl. 585.

And in *Hollingsworth v. Koon*,¹⁷ where the bill for an injunction was dismissed, and the land embraced in one of the mortgages was sold, but as to that sale the court found it had been prematurely and inequitably made, and that there was in fact less due to defendants than was claimed in the notes, it was held, by a divided court, that each party should have been required to pay his own costs.

§ 986. Costs under New York Code of Civil Procedure.—In New York, the allowance of costs in equity cases stands on the same footing now that it did before the enactment of the Code of Civil Procedure.¹⁸ The rules governing costs apply to actions for strict foreclosure, as well as to equitable actions for a decree of foreclosure and sale.¹⁹

Where the action is tried before a referee, the referee takes the place of the court, and the question of costs is a matter resting in his sound discretion.²⁰ If this discretion is honestly exercised,²¹ it can be interfered with only by an appeal from the judgment.²²

§ 987. Exceptions to discretion of court in allowing costs.—Where a party to a foreclosure is dissatisfied with the costs allowed by a trial court, his only method for obtaining relief is to challenge the finding as to costs by an exception and an appeal from the judgment.²³ Where a trial court

¹⁷ 117 Ill. 511, 6 N. E. 148. See *Koon v. Hollingsworth*, 97 Ill. 52.

¹⁸ *Law v. McDonald*, 9 Hun (N. Y.) 23. See *Phelps v. Woods*, 46 How. (N. Y.) Pr. 1; *Pratt v. Stiles*, 17 How. (N. Y.) Pr. 211; *Church v. Kidd*, 3 Hun (N. Y.) 254. See N. Y. Code Civ. Proc. §§ 3228, 3229, 3230.

¹⁹ *O'Hara v. Brophy*, 42 How. (N. Y.) Pr. 379. See *Bartow v. Cleveland*, 7 Abb. (N. Y.) Pr. 339, 16 How. (N. Y.) Pr. 364.

²⁰ *Graves v. Blanchard*, 3 N. Y. Code Rep. 25, 4 How. (N. Y.) Pr. 300; *Pratt v. Stiles*, 9 Abb. (N. Y.) Pr. 150, 17 How. (N. Y.) Pr. 211; *Ludington v. Taft*, 10 Barb. (N. Y.) 447; *Couch v. Millard*, 3 How. (N. Y.) Pr. N. S. 22; *Lossee v. Ellis*, 13 Hun (N. Y.) 655; *Law v. McDonald*, 9 Hun (N. Y.) 23.

²¹ *Taylor v. Root*, 48 N. Y. 687.

²² *Lossee v. Ellis*, 13 Hun (N. Y.) 655.

²³ *Rosa v. Jenkins*, 31 Hun (N.

allows costs under a mistaken idea of the law, it is the duty of the appellate court to correct the error.²⁴

In New York, the discretion of the trial judge in an action to foreclose a mortgage will not be interfered with on appeal to the general term, except in cases of abuse or gross error, in which recognized equities and rights were disregarded.²⁵

§ 988. Who may recover costs.—A judgment for costs may be entered in favor of any party to the action.²⁶ As a general rule, the mortgagee is entitled to his costs of the suit, whether he is plaintiff or defendant.²⁷ If, however, he has been guilty of improper conduct, the court may not only refuse him costs, but may compel him to pay the costs of the action.²⁸ Thus, if the action was occasioned by the unreasonable or fraudulent conduct of the mortgagee, he will be liable for its costs.²⁹

All defendants, who properly appear and answer, are entitled to their costs, as a rule. But where several defendants have the same solicitor, they will not be allowed to swell the costs by filing separate answers.³⁰ This rule is different in New York, where the plaintiff alone can tax a bill of costs against the mortgaged premises.

In the case of *McCormick v. Bauer*,³¹ where, by the failure

Y.) 384; *Woodford v. Bucklin*, 14 Hun (N. Y.) 444.

²⁴ *Morris v. Wheeler*, 45 N. Y. 708.

²⁵ *House v. Eisenlord*, 30 Hun (N. Y.) 90. See *ante*, § 985.

²⁶ *Garr v. Bright*, 1 Barb. Ch. (N. Y.) 257. See *Matheson v. Rogers*, 84 S. C. 458, 65 S. E. 1054.

²⁷ *Concklin v. Coddington*, 12 N. J. Eq. (1 Beas.) 250, 72 Am. Dec. 393. See *Hurd v. Callahan*, 9 Abb. (N. Y.) N. C. 374; *Berlin Building & L. Assoc. v. Clifford*, 30 N. J. Eq. (3 Stew.) 482; *Young v. Young*, 17 N. J. Eq. (2 C. E. Gr.) 161.

²⁸ *Pratt v. Stiles*, 9 Abb. (N. Y.) Pr. 150, 17 How. (N. Y.) Pr. 211; *Large v. Van Doren*, 14 N. J. Eq. (1 McCart.) 208; *Concklin v. Coddington*, 12 N. J. Eq. (1 Beas.) 250, 72 Am. Dec. 393; *Detillin v. Gale*, 7 Ves. 583. Compare, *Bathgate v. Haskin*, 63 N. Y. 261.

²⁹ *Saunders v. Frost*, 22 Mass. (5 Pick.) 259, 16 Am. Dec. 394.

³⁰ *Danbury v. Robinson*, 14 N. J. Eq. (1 McCart.) 324.

³¹ 122 Ill. 573, 13 N. E. 852.

of A to record an assignment to him of a mortgage for purchase money, it had become subordinated to a trust deed given by the original mortgagee after reconveyance to him; and appellants, claiming under subsequent trust deeds, sought to enforce their liens against lots,—successfully so far as the first trust deed is concerned,—and made no attempt to get rid of A's mortgage, it was held the appellants cannot claim that, because they have incidentally benefited the appellees, who claim through A, the appellees shall reimburse them the expenses of the litigation.

§ 989. **Prior mortgagee entitled to costs.**—A prior mortgagee, who has been properly made a defendant for the purpose of having the amount of his claim ascertained, is entitled to a bill of costs,³² and the same is true where such mortgagee has been improperly joined as a party to the action. In the first case, he is entitled to have his costs paid out of the property, and in the latter, to have them taxed against the plaintiff personally.³³

Where a prior mortgagee is made a party to an action for foreclosure, brought by a second mortgagee, he is entitled to have his taxable costs first paid out of the proceeds of the sale, and if the second mortgagee wishes to save such costs, he must tender the prior mortgagee the amount due on his mortgage.³⁴ Such a prior mortgagee will not forfeit his right to costs by setting up in his answer, in addition

³² *Boyd v. Dodge*, 10 Paige Ch. (N. Y.) 42; *Vroom v. Ditmas*, 4 Paige Ch. (N. Y.) 526; *Slee v. Manhattan Ins. Co.* 1 Paige Ch. (N. Y.) 48; *Berlin Building & Loan Assoc. v. Clifford*, 30 N. J. Eq. (3 Stew.) 482; *Lithauer v. Royle*, 17 N. J. Eq. (2 C. E. Gr.) 40.

³³ *Millandon v. Brugiere*, 11 Paige Ch. (N. Y.) 163; *Boyd v. Dodge* 10 Paige Ch. (N. Y.) 42.

³⁴ *Concklin v. Coddington*, 12 N. J. Eq. (1 Beas.) 250, 72 Am. Dec. 393.

to his mortgage, an interest in the premises acquired under a tax sale, even if such claim is decided against him.³⁵

But it is thought, that if such prior mortgagee puts in an answer and compels the plaintiff to prove his case, and thereby unnecessarily increases the costs, where the right of such mortgagee might have been properly protected by an appearance on the reference to compute the amount due, he will not only be denied his costs, but may properly be called upon to pay the costs consequent upon such conduct.³⁶

The court of chancery of New Jersey, in the case of *Scott v. Somers*,³⁷ say that where the owner of different lots gives separate mortgages on the several lots to different persons, and afterwards gives a single mortgage on all the lots to another person, and the holder of the last mortgage on all the lots files a bill to foreclose, and makes prior mortgagees of each lot parties defendant, and they appear and prove their mortgages, and upon the sale not enough is realized to pay the amount of the first mortgage, costs must be borne by such prior mortgagees in proportion to the amount realized by them respectively. In this case the proceedings by the complainant were of great advantage to the several prior mortgagees. He procured a sale of all the lots at about what it would have cost each one of the prior mortgagees to sell one lot. In other words, it was a saving of about three-fourths of the cost to each one of the prior mortgagees. When these prior incumbrancers were made parties, they might each have asked to be dismissed with costs.³⁸ But it is well settled that in all cases where a prior incumbrancer, instead of asking to be dismissed, consents to a sale, and to take his principal and interest out of the proceeds, he must, as he thereby adopts the suit, and takes the benefit of it, contribute to the cost of it. In such a case the costs of all parties will be paid out of the

³⁵ *Concklin v. Coddington*, 12 N. J. Eq. (1 Beas.) 250, 72 Am. Dec. 393.

³⁶ *Barnard v. Bruce*, 21 How. (N. Y.) Pr. 360.

³⁷ 9 Atl. (N. J. Ch.) 718.

³⁸ See Dan. Chan. Pr. 1390.

fund, even though there may not be enough left to pay the prior incumbrancer his principal and interest.³⁹

§ 990. Costs to subsequent incumbrancers.—A subsequent incumbrancer was formerly entitled to a bill of costs in a mortgage foreclosure.⁴⁰ But, if subsequent incumbrancers unnecessarily appeared and answered, they were not entitled to costs until the plaintiff's debt and costs had been paid.⁴¹ Now, however, a junior lienor is rarely allowed a bill of costs.

If the claims of subsequent incumbrancers are correctly set forth in the complaint for the foreclosure of a prior mortgage, it will not be necessary for them to appear, because their rights will be fully protected under the decree; and it has been said, that where the appearance of such an incumbrancer, though proper, is not necessary, the plaintiff, upon receiving the amount due him, may discontinue as against subsequent incumbrancers who have appeared, without costs to them.⁴²

By the rules and the course of practice of the court of chancery of New York, a subsequent incumbrancer was not entitled to costs until the debts and costs of all prior incumbrancers had been satisfied.⁴³

§ 991. Costs on two foreclosures against same property.—In *Wendell v. Wendell*,⁴⁴ where there were two separate mortgages on the same property, belonging to different mortgagees, and the holder of the first mortgage filed a bill of foreclosure against the second mortgagee and the owners of the mortgaged premises, and the same solicitor

³⁹ *Scott v. Somers* (N. J. Ch.) 9 Atl. 718; *Scattergood v. Keeley*, 40 N. J. Eq. (13 Stew.) 491, 4 Atl. 440.

⁴⁰ *Young v. Young*, 17 N. J. Eq. (2 C. E. Gr.) 161.

⁴¹ *Barnard v. Bruce*, 21 How. (N. Y.) Pr. 360; *Merchants' Ins. Co. v. Marvin*, 1 Paige Ch. (N. Y.) 557.

⁴² *Gallagher v. Egan*, 2 Sandf. (N. Y.) 742.

⁴³ *Boyd v. Dodge*, 10 Paige Ch. (N. Y.) 42; *Lithauer v. Royle*, 17 N. J. Eq. (2 C. E. Gr.) 40, 44. See *Smack v. Duncan*, 4 Sandf. Ch. (N. Y.) 621.

⁴⁴ 3 Paige Ch. (N. Y.) 509.

filed another bill in behalf of the second mortgagee, against the first mortgagee and the owners of the premises, to foreclose the second mortgage, the court held, that only one bill of foreclosure was necessary, and that the owners of the equity of redemption could be charged with the costs of one suit only.⁴⁵ This decision is based upon the principle, that where an action is unnecessarily brought, or where the relief asked for, might have been obtained by an application to the court on a motion in a case already pending, the party commencing such action cannot recover costs.⁴⁶

But, where a subsequent incumbrancer cannot secure the relief desired, by an application in a suit already pending, the above rule does not apply. Thus, where a second mortgagee is unable to secure the relief prayed for,—that is, to obtain a satisfaction of his mortgage,—in a suit already pending for the foreclosure of a prior mortgage, because of an injunction staying the sale in such suit, he will be entitled to his costs in an independent action to foreclose.⁴⁷

§ 992. When costs not allowed to mortgagee.—While a mortgagee plaintiff is generally entitled to costs, yet he will not be allowed costs if the foreclosure is defective, on account of his errors in the conduct of the proceedings, whereby a new foreclosure is rendered necessary.⁴⁸

Where a mortgagee, by his refusal to accept the mortgage debt when tendered, or by interposing groundless objections to a redemption,⁴⁹ compels the mortgagor or his assignee to resort to an action, he will not be allowed, but on the contrary, may sometimes be compelled to pay costs.⁵⁰ Where the plain-

⁴⁵ *Thompson v. Skeen*, 14 Utah, 209, 46 Pac. 1103.

⁴⁶ *Roosevelt v. Ellithorp*, 10 Paige Ch. (N. Y.) 415; *De LaVergne v. Evertson*, 1 Paige Ch. (N. Y.) 181, 19 Am. Dec. 411.

⁴⁷ *Bache v. Purcell*, 6 Hun (N.

Y.) 518, aff'd 51 How. (N. Y.) Pr. 270.

⁴⁸ *Clark v. Stilson*, 36 Mich. 482.

⁴⁹ See *Costigan v. Costigan*, 20 R. I. 535, 40 Atl. 341.

⁵⁰ *Slee v. Manhattan Co.* 1 Paige Ch. (N. Y.) 48. See *I'room v. Dismas*, 4 Paige Ch. (N. Y.) 535.

tiff in a mortgage foreclosure, unnecessarily sets out the rights of the several defendants at length, the extra costs occasioned thereby will not be allowed on taxation.⁵¹

§ 993. **When costs not allowed to defendants.**—Costs will not be allowed to a defendant who unnecessarily answers;⁵² and where an action has been unreasonably, unjustifiably or improperly defended, so that unnecessary expenses have been incurred, it is thought that the court may, in its discretion, order the costs, or such part of them as may be proper, to be paid personally by the contesting party; otherwise the costs of the prevailing party should be paid from the fund.⁵³

§ 994. **Notice of no personal claim.**—It has been seen,⁵⁴ that the plaintiff in a mortgage foreclosure may relieve himself of the expense of unnecessary disclaimers, by defendants who are made parties to the action solely for the purpose of extinguishing their claims and of perfecting the title, by serving upon them a notice that no personal claim is made against them; if any defendant, served with such a notice, unnecessarily defends, he will be personally liable for costs to the plaintiff.⁵⁵ A notice of no personal claim is required, although a copy of the complaint may have been served.⁵⁶

But it is thought that the neglect of the plaintiff to serve a notice of no personal claim, will not deprive the court of

⁵¹ *Union Ins. Co. v. Van Rensselaer*, 4 Paige Ch. (N. Y.) 85.

⁵² *Rood v. Winslow*, 2 Doug. (Mich.) 68.

⁵³ *Millandon v. Brugiere*, 11 Paige Ch. (N. Y.) 163; *Boyd v. Dodge*, 10 Paige Ch. (N. Y.) 42; *Bank of Plattsburg v. Platt*, 1 Paige Ch. (N. Y.) 464; *In re Wright*, 16 Fed. 482, 485.

⁵⁴ See *ante*, § 261; N. Y. Code Civ. Proc. § 423.

⁵⁵ *Barker v. Burton*, 67 Barb. (N. Y.) 458; *O'Hara v. Brophy*, 24 How. (N. Y.) Pr. 379; *Benedict v. Warriner*, 14 How. (N. Y.) Pr. 570; *Gallagher v. Egan*, 2 Sandf. (N. Y.) 742; *Adams v. Myers*, 61 Wis. 385.

⁵⁶ *O'Hara v. Brophy*, 24 How. (N. Y.) Pr. 379.

power to award costs against a defendant who unnecessarily or unreasonably defends.⁵⁷

§ 995. Effect of excessive demand in the complaint.—

The fact, that a mortgagee demands a larger sum in his complaint than the court finally decides he is entitled to receive, is no ground for refusing him a bill of costs.⁵⁸ The court held, in *Loftus v. Swift*,⁵⁹ that "a mortgagee is always considered as entitled to costs, unless there be something of positive misconduct. Merely extending his claim beyond what the court finally decides he is entitled to, is no ground for refusing him his costs." If, however, he has acted oppressively in demanding a larger sum than was due on his mortgage, and the mortgagor has been diligent in endeavoring to ascertain from him the amount of the incumbrance, in order to pay it, costs will be denied to him, and possibly, in some cases, awarded against him.⁶⁰

§ 996. Effect of tender after action brought.—Usually a tender of the payment of a debt, at its maturity, releases the party making such tender from liability for interest and costs thereafter; but it seems that in New York,⁶¹ a mortgagor cannot make and plead a tender in a mortgage foreclosure, for the reason that a tender to be good, must be com-

⁵⁷ *Gallagher v. Egan*, 2 Sandf. (N. Y.) 742.

⁵⁸ *Concklin v. Coddington*, 12 N. J. Eq. (1 Beas.) 250, 72 Am. Dec. 393; *Loftus v. Swift*, 2 Sch. & L. 642.

⁵⁹ 2 Sch. & L. 657, and this language is approved in the case of *Concklin v. Coddington*, 12 N. J. Eq. (1 Beas.) 250, 72 Am. Dec. 393.

⁶⁰ *Van Buren v. Olmstead*, 5 Paige Ch. (N. Y.) 9; *Vroom v. Dittmas*, 4 Paige Ch. (N. Y.) 526; *Large v. Van Doren*, 14 N. J. Eq.

(1 McCart.) 208; *Detillin v. Gale*, 7 Ves. 583.

⁶¹ In New York it was formerly held, that a tender made no difference in the amount of the costs. *Bartow v. Cleveland*, 16 How. (N. Y.) Pr. 364, 7 Abb. (N. Y.) Pr. 339; *Pratt v. Ramsdell*, 16 How. (N. Y.) Pr. 59, 62, 7 Abb. (N. Y.) Pr. 340n; *Stevens v. Veriane*, 2 Lans. (N. Y.) 90. But these cases were overruled in *Bathgate v. Has- kin*, 63 N. Y. 261.

plete, and include not only the money due on the demand, but also all costs,⁶² and the costs in a mortgage foreclosure, resting in the discretion of the court, are uncertain.⁶³

The New York Code of Civil Procedure provides,⁶⁴ that where a complaint demands judgment for a sum of money only, which sum is certain or may be reduced to certainty by calculation, the defendant or his attorney may, at any time before the trial, tender to the plaintiff, or his attorney, such a sum of money as he conceives will be sufficient to pay the plaintiff's demand, together with the costs of the action to that time. But it is said that this rule is confined to actions at law, and for that reason does not affect actions brought for the foreclosure of mortgages.⁶⁵

Yet, it is thought that a mortgagor, or the owner of the equity of redemption, may relieve himself from all liability for the payment of interest and costs, by tendering to the plaintiff the amount due upon the mortgage, together with such costs as he thinks sufficient; upon refusal of the plaintiff to accept the amount, the mortgagor may apply to the court for leave to pay the amount due, and such costs as the court in its discretion may allow, into court, and upon such payment the court will either order the action discontinued or

⁶² See *Fuller v. Brown*, 167 Ill. 293, 47 N. E. 202; *Healy v. Protection Mutual Fire Ins. Co.* 213 Ill. 99, 72 N. E. 678; *Neiman v. Wheeler*, 87 Ill. App. 670. See also *McClung v. Missouri Trust Co.* 137 Mo. 106, 38 S. W. 578.

Including attorney's fee. *Neiman v. Wheeler*, 87 Ill. App. 670; *Wittmeir v. Tidwell*, 147 Ala. 354, 40 So. 963; *Healy v. Protection Mutual Fire Ins. Co.* 213 Ill. 99, 72 N. E. 678; *Brand v. Kleinecke, as trustee, etc.* 77 Ill. App. 269; *Fuller v. Brown*, 167 Ill. 293, 47 N. E. 202; *Easton v. Woodbury*, 71 S. C. 250,

50 S. E. 790. See also *Carwile v. Crump*, 165 Ala. 206, 51 So. 744; *Klokke v. Escailler*, 124 Cal. 297, 56 Pac. 1113.

⁶³ *Bartow v. Cleveland*, 7 Abb. (N. Y.) Pr. 339, 16 How. (N. Y.) Pr. 364; *Thurston v. Marsh*, 5 Abb. (N. Y.) Pr. 389, 14 How. (N. Y.) Pr. 572; *Pratt v. Ramsdell*, 16 How. (N. Y.) Pr. 59.

⁶⁴ N. Y. Code Civ. Proc. § 731. See also §§ 1634, 1635.

⁶⁵ *New York Fire Ins. Co. v. Burrell*, 9 How. (N. Y.) Pr. 398. See also *Rollins v. Barnes*, 23 App. Div. 240, 48 N. Y. Supp. 779.

stay all proceedings therein.⁶⁶ Where a tender is made before judgment, and the parties themselves do not mutually arrange the costs, either party may apply to the court for the taxation thereof.⁶⁷

§ 997. Costs on default.—Where judgment is taken by default in a mortgage foreclosure, costs will be allowed as provided in sections 3251, and 3252 of the New York Code of Civil Procedure; and it has been held, that the fact, that a tender of the amount due was made, will not make any difference as to the amount to be allowed.⁶⁸

§ 998. Costs allowed guardian ad litem.—In New York the compensation allowed to a guardian *ad litem* in an equitable action, is not dependent upon any provision of the Code. It was the practice of the court of chancery to compensate such guardian, for the services actually performed by him in the protection of the infant's interests, by allowing him to recover costs out of the proceeds of the sale, not exceeding the taxable items prescribed for such services.⁶⁹

It is a general rule, that the guardian *ad litem* of an infant defendant can be allowed only taxable costs as against a fund belonging to the other parties to the action.⁷⁰ Where an extra allowance is made to the guardian *ad litem* of infant defendants, in a mortgage foreclosure, it must be paid out of their share, since only the taxable costs can be charged

⁶⁶ *Bartow v. Cleveland*, 7 Abb. (N. Y.) Pr. 339, 16 How. (N. Y.) Pr. 364. See N. Y. Code Civ. Proc. §§ 1634, 1635.

⁶⁷ *Bartow v. Cleveland*, 7 Abb. (N. Y.) Pr. 339, 16 How. (N. Y.) Pr. 364; *Stevens v. Veriane*, 2 Lans. (N. Y.) 90; *Pratt v. Ramsdell*, 16 How. (N. Y.) Pr. 59. See *Morris v. Wheeler*, 45 N. Y. 708.

⁶⁸ *Bartow v. Cleveland*, 16 How. (N. Y.) Pr. 364, 7 Abb. (N. Y.)

Pr. 339; *Pratt v. Ramsdell*, 16 How. (N. Y.) Pr. 59, 7 Abb. (N. Y.) Pr. 340n; *Stevens v. Veriane*, 2 Lans. (N. Y.) 90. But see *Adams v. Myers*, 61 Wis. 385.

⁶⁹ *Weed v. Paine*, 31 Hun (N. Y.) 10, 13 Abb. (N. Y.) N. C. 200; *Gott v. Cook*, 7 Paige Ch. (N. Y.) 521, 544; *Union Ins. Co. v. Rensselaer*, 4 Paige Ch. (N. Y.) 85.

⁷⁰ *Union Ins. Co. v. Rensselaer*, 4 Paige Ch. (N. Y.) 85.

upon that portion of the fund which belongs to other parties.⁷¹ But only very special circumstances will authorize a court to allow anything beyond the taxable costs of the guardian *ad litem*, to be charged upon a fund belonging to an infant.⁷²

§ 999. **Costs on appointment of receiver.**—Where it is found necessary to appoint a receiver to take charge of the mortgaged premises or to collect the rents and profits thereof during the pendency of the action, the costs of the motion for the appointment of such receiver are sometimes reserved until the hearing,⁷³ even where the application therefor is refused;⁷⁴ but the court may, in its discretion, deal with the costs of a motion for a receiver at the time of the application;⁷⁵ or the costs of the application may be ordered to be taxed with the costs of the action.⁷⁶

§ 1000. **Costs on resale.**—Where a sale is reported by the officer conducting it, and the purchaser refuses to comply with its terms, the court may, upon representations by the plaintiff, or other parties in interest, order that cause be shown why the terms of the sale should not be complied with; if sufficient cause is not shown, it may, considering all the circumstances of the case, either ratify the sale or set it aside, as will best subserve the interests of the parties concerned.⁷⁷ And in such a case, if the sale is set aside, the court may properly impose upon the party reported as purchaser, all the

⁷¹ *Downing v. Marshall*, 37 N. Y. 391; *Union Ins. Co. v. Rensselaer*, 4 Paige Ch. (N. Y.) 85.

⁷² *Union Ins. Co. v. Rensselaer*, 4 Paige Ch. (N. Y.) 85. See also *Seitz v. Schrell*, 30 App. Div. 211, 51 N. Y. Supp. 608.

⁷³ *Chaplin v. Young*, 6 L. T. N. S. 97.

⁷⁴ *Baxter v. West*, 28 L. J. Ch. 169; *Coope v. Creswell*, 12 W. R. 299.

⁷⁵ *Goodman v. White*, 1 Jac. & W. 593; *Wilson v. Wilson*, 18 Jur. 581; *Skinner's Company v. Irish Society*, 1 M. & C. 169; *Fall v. Elkins*, 9 W. R. 861.

⁷⁶ *Bowker v. Henry*, 6 L. T. N. S. 43; *Topping v. Searson*, 6 L. T. N. S. 449; *Fall v. Elkins*, 9 W. R. 861.

⁷⁷ *Schaefer v. O'Brien*, 49 Md. 253.

costs and expenses attending the sale, as the condition of releasing him from his bid and the consequences of his default.⁷⁸

§ 1001. Who personally liable for costs.—It was said by Lord Eldon, in the case of *Detillen v. Gale*,⁷⁹ that “it is admitted that there is no instance in which a mortgagee has been called upon to pay costs;”⁸⁰ but it is thought that the mortgagee may be required to pay costs, if he has rejected a tender of the full amount due him, together with his costs, or if the litigation has in any way been occasioned by his fraud or mistake.⁸¹ Where the plaintiff in a mortgage foreclosure so misstates the rights of a defendant as to render it necessary for him to put in an answer to protect his rights, the plaintiff may be personally charged with the extra costs occasioned thereby.⁸²

The mortgagor, or any other party to the action, who unnecessarily defends it, may be charged personally with the costs, for the benefit of those entitled to the surplus.⁸³ Thus, costs are properly imposed against a subsequent incumbrancer who defends against a bill of review filed by a principal defendant, and maintains the supplemental litigation in opposition to the terms of a mortgage binding his lands.⁸⁴

It has been held, that a purchaser of a portion of the mortgaged premises from the mortgagor, should pay his portion of all legitimate costs incurred in the foreclosure of a mortgage upon such lands;⁸⁵ and it is certain that a sub-

⁷⁸ *Schafer v. O'Brien*, 49 Md. 253.

⁷⁹ 7 Ves. 584.

⁸⁰ *House v. Eisenlord*, 30 Hun (N. Y.) 90.

⁸¹ *Pratt v. Stiles*, 9 Abb. (N. Y.) Pr. 150, 17 How. (N. Y.) Pr. 211. See also *Bemus v. Thrall*, 35 Misc. 137, 70 N. Y. Supp. 463.

⁸² *Unions Ins. Co. v. Rensselaer*, 4 Paige Ch. (N. Y.) 85.

⁸³ *Jones v. Phelps*, 2 Barb. Ch. (N. Y.) 440; *Barnard v. Bruce*, 21 How. (N. Y.) Pr. 360; *O'Hara v. Brophy*, 24 How. (N. Y.) Pr. 379. See *ante*, § 261.

⁸⁴ *Mickle v. Maxfield*, 42 Mich. 304.

⁸⁵ *Bates v. Ruddick*, 2 Iowa, 425, 65 Am. Dec. 774.

sequent purchaser of mortgaged premises may make himself personally liable for costs, although he may not be liable for the payment of the mortgage debt, if he makes an unreasonable and unfounded defence to the suit, and the property is not of sufficient value to pay the incumbrance.⁸⁶

§ 1002. **Out of what fund costs payable.**—The costs of a mortgage foreclosure are usually payable from the proceeds of the sale of the mortgaged premises.⁸⁷ It is thought that where the circumstances of the case require it, the court may direct the costs to be paid out of any moneys in its custody, belonging to any of the parties litigant, and subject to the lien of the mortgage.⁸⁸ Thus, where a prior mortgagee is properly made a party to a foreclosure, for the purpose of ascertaining the amount of his claim, such mortgagee is entitled to his costs, to be paid out of the property, or by the plaintiff personally, in the discretion of the court.⁸⁹

But where a party is improperly made a defendant, his costs must be paid by the plaintiff personally,⁹⁰ and not out of the general fund.⁹¹ Where a complaint is dismissed as to some of the defendants, the costs are to be paid by the plaintiff, and not out of the funds raised by the sale of the mortgaged premises.⁹²

⁸⁶ *Danbury v. Robinson*, 14 N. J. Eq. (1 McCart.) 324.

⁸⁷ *Botsford v. Botsford*, 49 Mich. 29; *Carter v. Builders' Construction Co.* 130 App. Div. 609, 115 N. Y. Supp. 339; *Jennings v. Hare*, 53 S. C. 396, 31 S. E. 282.

A mortgage is a lien upon the land or upon the surplus moneys for costs allowed to the mortgagee. *Bushwick Savings Bank v. Traum*, 26 App. Div. 532, 50 N. Y. Supp. 542.

⁸⁸ *Falkner v. Printing Co.* 74 Ala.

359. But see *Faison v. Hicks*, 127 N. C. 371, 37 S. E. 511.

⁸⁹ *Chamberlain v. Dempsey*, 36 N. Y. 144, 147; *Jones v. Phelps*, 2 Barb. Ch. (N. Y.) 440; *Mayer v. Salisbury*, 1 Barb. Ch. (N. Y.) 546; *Boyd v. Dodge*, 10 Paige Ch. (N. Y.) 42.

⁹⁰ *Millandon v. Brugiere*, 11 Paige Ch. (N. Y.) 163.

⁹¹ *Nelson v. Montgomery*, 1 Edw. Ch. (N. Y.) 657.

⁹² *Rosa v. Jenkins*, 31 Hun (N. Y.) 384.

§ 1003. Counsel fees in foreclosing mortgages.—It is the general rule, that a reasonable attorney's fee for foreclosing a mortgage, beyond the costs allowed by law, may be contracted for in a mortgage, and the court will consider the amount stipulated for by the parties to be reasonable, unless it is extravagantly large and extortionate, so as to show that it was intended as a penalty to be held *in terrorem* over the mortgagor.⁹³ A percentage may be allowed instead

⁹³ *Munter v. Linn*, 61 Ala. 492; *Alden v. Pryal*, 60 Cal. 215; *Clawson v. Munson*, 55 Ill. 394; *McLane v. Abrams*, 2 Nev. 207, 208; *Cox v. Smith*, 1 Nev. 161, 90 Am. Dec. 476; *Daly v. Maitland*, 88 Pa. St. 384, 32 Am. Rep. 457; *Hitchcock v. Merrick*, 15 Wis. 522; *Rice v. Cribb*, 12 Wis. 179. Compare, *Ogborn v. Eliason*, 77 Ind. 393; *Alexandrie v. Saloy*, 14 La. An. 327. But see *Gordon v. Decker*, 19 Wash. 188, 52 Pac. 856.

In *McLane v. Abrams*, 2 Nev. 199, a stipulation for ten per centum on the amount of the mortgage, \$6,000, was not regarded as unreasonable. In *Daly v. Maitland*, 88 Pa. St. 384, 13 West. Jur. 204, a stipulation for a commission of five per centum on a mortgage of \$14,000 was considered to be unreasonable. *Haldeman v. Massachusetts Mut. L. Ins. Co.* 21 Ill. App. 146, affd. 120 Ill. 390, 11 N. E. 526; *Culver v. Brinkerhoff*, 180 Ill. 548, 54 N. E. 585; *Langley v. Andrews*, 142 Ala. 665, 38 So. 238; *Guaranty Savings & Loan Ass'c. of Minneapolis*, Minn. v. *Ascherman*, 108 Iowa, 150, 78 N. W. 823; *Warren v. Soddart*, 6 Idaho, 692, 59 Pac. 540; *Uedelhofen v. Mason*, 201 Ill. 465, 66 N. E. 364; *Healy v. Protection Mutual Fire Ins. Co.*

213 Ill. 99, 72 N. E. 678; *Salomon v. Stoddard*, 107 Ill. App. 227. See *Lehman v. Comer*, 89 Ala. 579, 8 So. 241; *Hewitt v. Dean*, 91 Cal. 5, 25 Pac. 753; *Georgia R. & Banking Co. v. Pendleton*, 87 Ga. 751, 13 S. E. 822; *Butterfield v. Hungerford*, 68 Iowa, 249, 26 N. W. 136; *Damon v. Deeves*, 62 Mich. 465, 29 N. W. 42; *Mjones v. Yellow Medicine County Bank*, 45 Minn. 335, 47 N. W. 1072; *Condict v. Fowler*, 47 Mo. App. 514; *Memphis & L. R. Co. v. Dow*, 120 U. S. 287, 30 L. ed. 595, 7 Sup. Ct. Rep. 482; *Gravette v. Canadian & American Mortgage & Trust Co. Ltd.* 42 Wash. 457, 85 Pac. 36; *O'Neal v. Hart*, 116 Cal. 69, 47 Pac. 926; *Purvis v. Frink*, 57 Fla. 519, 49 So. 1023. See also *Foster as adm'r, etc. v. Honan*, 22 Ind. App. 252, 53 N. E. 667; *Pitzele v. Cohn*, 217 Ill. 30, 75 N. E. 392; *Toan v. Alexander*, 185 Ill. 254, 56 N. E. 1111.

In California a mortgagee providing for a reasonable attorney's fee and a note secured thereby providing for a fee of 5 per cent. must be read together as one contract limiting such a fee to 5 per cent. *Hewitt v. Dean*, 91 Cal. 5, 25 Pac. 753.

In Illinois an agreement in a mortgage for an attorney's fee

of a fixed sum as a fee, or the fee may be stipulated for in blank.⁹⁴

A provision in a mortgage, that the mortgagor shall, in case of foreclosure, pay the costs and "fifty dollars as liquidated damages for the foreclosure of the mortgage," has been held to be void, because so indefinite that the court could not tell whether the amount was for something legal or illegal, and a judgment rendered on such a stipulation for fifty dollars as an attorney's fee, was declared erroneous.⁹⁵ But a stipulation that the mortgagee shall be entitled on

which is reasonable in amount, may be taxed as a part of the costs in a suit to foreclose the mortgage. Such an agreement is valid in this state. *Haldeman v. Massachusetts Mut. L. Ins. Co.* 120 Ill. 390, 11 N. E. 526.

Notice of sale not included—When.—The right of a lawyer who is trustee in an ordinary deed of trust, to necessary and reasonable charges and expenses, does not extend to an attorney's fee for writing the notice of sale, neither can he employ his partner to do it. *Condict v. Flower*, 47 Mo. App. 514.

Fee must be paid to stop foreclosure.—When a mortgage containing a stipulation for attorneys' fees in case placed in an attorney's hands for foreclosure, and the notice is drawn by him and set up in type by the printer, the attorneys' fees and printers' charges become part of the mortgage debt, so that the mortgagor cannot stop the foreclosure by paying the mortgage without paying them. *Mjones v. Yellow Medicine County Bank*, 45 Minn. 335, 47 N. W. 1072. See *ante*, § 983.

A mortgage given to secure a note which contains a provision for

an attorney's fee, secures the attorney's fee also. *Bailey v. Butler*, 138 Ala. 153, 35 So. 111; *Peachy v. Witter*, 131 Cal. 316, 63 Pac. 468; *Worth v. Worth*, 155 Cal. 599, 102 Pac. 663; *National Bank of California v. Mulford*, 120 Pac. 446 (Cal. App.); *County Bank of San Luis Obispo v. Goldtree*, 129 Cal. 160, 61 Pac. 785. See also *Durham v. Stephenson*, 41 Fla. 112, 25 So. 284; *Millsaps v. Chapman, as rec'r, etc.* 76 Miss. 942, 71 Am. St. Rep. 549, 26 So. 369; *Contra, Evans v. Mansure & Tebbetts Implement Co.* 87 Fed. 275 (Tex.)

⁹⁴ Thus, where the mortgage foreclosure provided for "counsel fees and charges of attorneys and counsel employed in such foreclosure suit, not exceeding," it was held that counsel fees were properly allowed. *Alden v. Pryal*, 60 Cal. 215. But see *Johnson v. Clegg, as trustee, etc.* 121 Ill. App. 550.

See *Woodward v. Brown*, 119 Cal. 283, 51 Pac. 2, 63 Am. St. Rep. 108.

⁹⁵ *Foote v. Sprague*, 13 Kan. 155; *Stover v. Johnnycake*, 9 Kan. 367; *Tholen v. Duffy*, 7 Kan. 405; *Kurtz v. Sponable*, 6 Kan. 395.

foreclosure, "to a judgment for the possession of said premises, and costs, expenses and an attorney's fee of ten per centum of the amount due for foreclosing said mortgage," is valid; and on a mortgage debt of \$4,000, or less, such a percentage has been held not to be so excessive that a court of equity would refuse to enforce it.⁹⁶

The allowance of attorneys' fee without proper evidence of the amount of services rendered and the value thereof will be erroneous.⁹⁷ And it is said that a judgment in foreclosure is erroneous which directs the payment, out of the proceeds of the sale, of an allowance to the counsel of the commissioner who sells the land.⁹⁸

In those cases where the mortgage provides for indemnifying the mortgagee or trustee against all costs, charges and expenses, this will cover a reasonable allowance for attorney's fees, to be determined by the court or chancellor upon the proper proofs.⁹⁹ And it has been said that where there is a stipulation in a mortgage in which the mortgagor agrees to pay the attorney's fee and other expenses incurred by the mortgagees in the collection of the several sums mentioned in the mortgage, by foreclosure or otherwise, for the payment of which the mortgage is a lien, although contained in a clause relating more especially to advances other than the leading consideration, is not confined to attorneys' fees paid in the collection of such other sums, but extends to the collection of all sums accruing to the mortgagees.¹

In some of the states, as in Michigan, while the provision

⁹⁶ *Sharp v. Barker*, 11 Kan. 381. See also *Thornton v. Commonwealth Loan & Building Ass'c.* 181 Ill. 456, 54 N. E. 1037; *Armijo v. Henry*, 14 N. M. 181, 25 L.R.A. (N.S.) 275, 89 Pac. 305.

⁹⁷ *Butterfield v. Hungerford*, 68 Iowa, 249; *Cook v. Gilchrist*, 82 Iowa, 736; sub nom. *Cook v. Short-hill*, 48 N. W. 84.

⁹⁸ *Gay v. Davis*, 107 N. C. 269, 12 S. E. 194.

⁹⁹ *L'Engle v. L'Engle*, 21 Fla. 131; *Memphis & L. R. Co. v. Dow*, 120 U. S. 287, 30 L. ed. 595, 7 Sup. Ct. Rep. 482.

¹ *Lehman v. Comer*, 89 Ala. 579, 8 So. 241.

for an attorney's fee on foreclosure of a mortgage, contained in the power of sale, is operative and binding, it can only be enforced by a statutory foreclosure.²

In the supreme court of Georgia, in the case of *Georgia Railroad and Banking Company v. Pendleton*,³ it is said that indorsers upon a note secured by mortgage, who, after judgment upon the note, waive in writing any objection to a clause in the mortgage providing for attorneys' fees, cannot insist that a judgment foreclosing the mortgage does not conclude them as to the creditor's right to payment of such attorneys' fees out of the proceeds of the mortgaged property.

A stipulation in a mortgage, for the payment of an attorney's fee, is regarded as a compensation to the mortgagee for expenses incurred by the default of the mortgagor, and will not be relieved against in equity, if fairly entered into, unless it is evidently a penalty, or made the cloak for an usurious contract.⁴ An attorney's fee is not a lien upon the mortgaged property,⁵ unless so expressed in the mortgage.⁶ Counsel fees will not be allowed in the first instance by the appellate court.⁷

§ 1004. Counsel fees in Kentucky and Michigan.—It seems that a different doctrine prevails in Kentucky⁸ and Michigan.⁹ It was held by the supreme court of Michigan, in

² *Damon v. Deeves*, 62 Mich. 465, 29 N. W. 42.

³ 87 Ga. 751, 13 S. E. 822.

⁴ *Daly v. Maitland*, 88 Pa. St. 384, 32 Am. Rep. 457; *Baker v. Alberg*, 183 Ill. 258, 55 N. E. 672; *Baker v. Jacobson*, 183 Ill. 171, 55 N. E. 724; *Springer v. Cochrane*, 84 Ill. App. 644. Compare, *Myer v. Hart*, 40 Mich. 517, 25 Am. Rep. 558. See *Alden v. Pryal*, 60 Cal. 215; *Scholey v. DeMattos*, 18 Wash. 504, 52 Pac. 242. See also *Fidelity Savings Ass'n v. Shea*, 6 Idaho, 405, 55 Pac. 1022.

⁵ *Klokke v. Escailler*, 124 Cal. 297;

Luddy v. Pavkovich, 137 Cal. 284, 70 Pac. 177.

⁶ *Haensel v. Pacific State Savings & Loan & Building Co.* 135 Cal. 41, 67 Pac. 38.

⁷ *Fender v. Robinson*, 135 Cal. 26, 66 Pac. 969.

⁸ *Rilling v. Thompson*, 12 Bush (Ky.) 310; *Thomasson v. Townsend*, 10 Bush (Ky.) 114.

⁹ *Millard v. Truax*, 50 Mich. 343; *Botsford v. Botsford*, 49 Mich. 29; *Vosburgh v. Lay*, 45 Mich. 455; *Parks v. Allen*, 42 Mich. 482; *Myer v. Hart*, 40 Mich. 517, 29 Am. Rep. 553.

the case of *Vosburgh v. Lay*,¹⁰ that a stipulation in a mortgage fixing in advance a gross allowance, is against public policy and cannot be enforced; and that this is specially true, where the allowance for an attorney's fee differs from that authorized by statute.¹¹

§ 1005. Stipulation for attorney's fee—When usurious.—A stipulation in a mortgage, that the mortgagor, in addition to legal interest, shall pay to the mortgagee an attorney's fee for collecting the debt, such fee to be taxed in the judgment, will not render the agreement usurious, and may be enforced,¹² because the debtor, by neglecting or refusing to pay the debt, imposes upon the mortgagee the expense of resorting to law to enforce his rights, and it is only just that all the expenses of foreclosure should be borne by the party whose wrong has made it necessary to incur them.¹³ But such a stipulation will not embrace the unnecessary and useless services of a solicitor, however extensive or laborious.¹⁴ Where such a stipulation is intended as a gratuity, or is without consideration, or is inserted as a cover for usury, which is prohibited by statute, it will be void.¹⁵

¹⁰ 45 Mich. 455.

¹¹ The court held in this case, that "in respect to all proceedings of this nature, and which are exceptional and peculiar, all allowances which partake of the character of fees are dependent on legislation," citing *Booth v. McQueen*, 1 Doug. (Mich.) 41.

¹² *Munter v. Linn*, 61 Ala. 492; *McGill v. Griffin*, 32 Iowa, 445; *Weatherby v. Smith*, 30 Iowa, 131, 6 Am. Rep. 663; *Nelson v. Everett*, 29 Iowa, 184; *Conrad v. Gibbon*, 29 Iowa, 120; *Gilmore v. Ferguson*, 28 Iowa, 220; *Gower v. Carter*, 3 Clarke (Iowa) 244, 66 Am. Dec. 71.

In *Williams v. Meeker*, 29 Iowa, 292, an attorney's fee of \$75 was allowed. Contra, *Rilling v. Thompson*, 12 Bush (Ky.) 310; *Thomasson v. Townsend*, 10 Bush (Ky.) 114.

See *Huber v. Brown*, 148 Ill. App. 399.

¹³ *Hitchcock v. Merrick*, 15 Wis. 522; *Rice v. Cribb*, 12 Wis. 179; *Boyd v. Summer*, 10 Wis. 41; *Tallman v. Truesdell*, 3 Wis. 443, 454.

¹⁴ *Soles v. Sheppard*, 99 Ill. 620.

¹⁵ *Soles v. Sheppard*, 99 Ill. 616. See *Fidelity Savings Ass'c. v. Shea*, 6 Idaho, 405, 55 Pac. 1022.

§ 1006. Allowance of attorney's fee—Discretion of court.—It has been said, that the allowance of an attorney's fee for the collection of a mortgage, is in the nature of a penalty, rather than of liquidated damages;¹⁶ and that it is within the sound discretion of the court in which the mortgage is being foreclosed, to determine whether the whole, or any part of the sum stipulated for in the mortgage as a counsel fee, shall be included in the judgment.¹⁷ The allowance of the stipulated fee, being a matter of discretion with the court, cannot be reviewed on appeal, unless it appears that such discretion has been abused.¹⁸

The supreme court of Alabama held, in *Munter v. Linn*,¹⁹ that in case of such a stipulation, a reasonable sum only can be collected as an attorney's fee, although a larger sum or per centum may have been agreed upon by the parties. And the supreme court of Mississippi held, in the case of *Voechtling v. Grau*,²⁰ that where a mortgage contains a stipulation, that in case of foreclosure, the mortgagor will pay "in addi-

¹⁶ *Daly v. Maitland*, 88 Pa. St. 384, 32 Am. Rep. 457; *Huber v. Brown*, 148 Ill. App. 399. But see *Scholey v. DeMattos*, 18 Wash. 504, 52 Pac. 242.

¹⁷ *Daly v. Maitland*, 88 Pa. St. 384, 32 Am. Rep. 457; *Reed v. Catlin*, 49 Wis. 686; *Patten v. Pepper Hotel Co.* 153 Cal. 460, 96 Pac. 296; *Hammond v. Erickson*, 135 Wis. 570, 116 N. W. 173; *Edwards, as trustee, etc. v. Grand*, 121 Cal. 254, 53 Pac. 796. See *Carriere v. Minturn*, 5 Cal. 435; *Insurance Co. v. Shields*, 12 Phila. (Pa.) 407; *Spengler v. Hahn*, 95 Wis. 472, 70 N. W. 466. But see *Wright v. Conservative Investment Co.* 49 Or. 177, 89 Pac. 387.

¹⁸ *Reed v. Catlin*, 49 Wis. 686. Where a mortgage contains a provision, that in case of foreclosure,

two per centum on the amount found due on the mortgage indebtedness, shall be allowed and included in the decree as a solicitor's fee, there will be no error in including such a fee in the decree. *McIntire v. Yates*, 104 Ill. 491.

A mortgage provided for the allowance of a counsel fee, "at the rate of — per centum, upon the amount which may be found to be due on principal and interest." The court allowed one hundred and fourteen dollars, being 25 per centum of the amount found due; it was held that such an allowance was authorized by the terms of the mortgage. *Rickards v. Hutchinson*, 18 Nev. 215. See also *Bonestell v. Bowie*, 128 Cal. 511, 61 Pac. 73.

¹⁹ 61 Ala. 497.

²⁰ 55 Wis. 312.

tion to the taxable costs a reasonable and customary sum for an attorney's or solicitor's fee," the amount to be paid for such fee must be ascertained by evidence, as the judge has no authority to fix the amount thereof on a mere inspection of the record, or from his personal knowledge of the services rendered.²¹

Where a mortgage contains a stipulation for the payment of a specified sum as an attorney's fee, in case the mortgage is foreclosed, it seems that the allowance of a greater sum will be erroneous.²² In the early case of *Remington v. Willard*,²³ however, where the mortgage contained a stipulation for the payment of a fee of seventy-five dollars, the court allowed, under the Wisconsin Code, five per centum on the amount due.

²¹ As to the necessity for proof of the value of an attorney's services, see *Wyant v. Pottorff*, 37 Ind. 512; *Samstag v. Conley*, 64 Mo. 476; *First Nat. Bank of Trenton v. Gay*, 63 Mo. 33, 21 Am. Rep. 430; *Woods v. North*, 84 Pa. St. 407, 24 Am. Rep. 201; *Follansbee v. Northwestern Mutual Life Ins. Co.* 87 Ill. App. 609; *Waymire v. Shipley*, 52 Or. 464, 97 Pac. 807; *Stone v. Billings*, 167 Ill. 170, 47 N. E. 372; *McClure v. Little*, 15 Utah, 379, 49 Pac. 298, 62 Am. St. Rep. 938; *Ames v. Bigelow*, 15 Wash. 532, 46 Pac. 1046; *Borcherdt v. Favor*, 16 Colo. App. 406, 66 Pac. 251; *Warren v. Stoddart*, 6 Idaho, 692, 59 Pac. 540; *Unity Co. v. Equitable Trust Co.* 204 Ill. 595, 68 N. E. 654; *Jones, as adm'r, etc. v. Stoddart*, 8 Idaho, 210, 67 Pac. 650; *Rohrhof v. Schmidt*, 218 Ill. 585, 75 N. E. 1062; *Hough v. Wells, as trustee, etc.* 86 Ill. App. 186; *McCormick, as trustee etc. v. Unity Co.* 142 Ill. App. 159; *Fidelity & Deposit Co. of Maryland v. Oliver*, 57 Wash. 31,

106 Pac. 483; *Kurtz v. Ogden Canyon Sanitarium Co.* 37 Utah, 313, 108 Pac. 14. See *Nathan, as adm'r, etc. v. Brand*, 67 Ill. App. 540, aff'd 167 Ill. 607, 47 N. E. 771; *Wattson v. Jones*, 101 Ill. App. 572. See also *Matheson v. Rogers*, 84 S. C. 458, 65 S. E. 1054; *Wright v. Neely*, 100 Ill. App. 310; *Commercial National Bank v. Johnson*, 16 Wash. 536, 48 Pac. 267; *Merrell v. Ridgely*, 57 So. 352 (Fla.) But see *Hellier v. Russell*, 136 Cal. 143, 68 Pac. 581; *Sweeney v. Kaufman*, 168 Ill. 233, 48 N. E. 144; *Carhart v. Allen*, 56 Fla. 763, 48 So. 47. Contra, *Hotaling v. Montieth*, 128 Cal. 556, 61 Pac. 95.

²² *Palmeter v. Carey*, 63 Wis. 426; *Uhrich v. Livergood*, 95 Ill. App. 640; *Lewis v. Sutton*, 122 Pac. 911 (Idaho); *Gunzenhauser v. Henke*, 97 Ill. App. 485, aff'd in 195 Ill. 130, 62 N. E. 896. See *Dennis v. Moses*, 18 Wash. 537, 40 L.R.A. 302, 52 Pac. 333. See also *Newburg v. Coyne*, 85 Ill. App. 74.

²³ 15 Wis. 583.

§ 1007. Allowance of attorney's fee a matter of contract or statute.—A judgment of foreclosure cannot include a sum as an attorney's fee in addition to the statutory costs, unless such sum is stipulated for in the mortgage,²⁴ or expressly authorized by the statute, as in some of the states.²⁵ It is thought, however, that courts of equity may allow the counsel fees incurred by the mortgagee in defending his title, without an express contract in the mortgage, or a statutory enactment providing therefor.²⁶

A stipulation in a mortgage, that a reasonable attorney's fee shall be taxed by the court and included in the bill of costs in case of foreclosure, is legal, and may be enforced.²⁷ Such provision does not limit the court's authority to allowing an attorney's fee solely as a part of the bill of costs, but the court may make a special allowance therefor in its decree.²⁸ And it has been said a provision in a trust deed, that in case of breach the trustee may file a bill of foreclosure "in his own name or otherwise," and from the proceeds pay solicitor's fees, authorizes such payment, although foreclosure is brought by the holder of the debt secured.²⁹ But it is thought that when the mortgage authorizes a sale on default, and directs the pay-

²⁴ *Sichel v. Carrillo*, 42 Cal. 493; *Stover v. Johnnycake*, 9 Kan. 367; *Wylie v. Karner*, 54 Wis. 591; *Hitchcock v. Merrick*, 15 Wis. 522; *Atwood v. Whittemore*, 94 Ill App. 294; *Johnson v. Clegg, as trustee, etc.* 121 Ill. App. 550; *Sitaton v. Webb*, 137 N. C. 35, 49 S. E. 55.

The statutory attorney's fee may be allowed on foreclosure of a mortgage, where the bond secured by the mortgage provides for a reasonable fee, and there is no evidence as to what is a reasonable fee. *Cook v. Gilchrist*, 82 Iowa, 736; subnom. *Cook v. Shorthill*, 48 N. W. 84.

²⁵ *Hunt v. Chapman*, 62 N. Y.

333; *Bocks v. Hathorn*, 17 Hun (N. Y.) 87. See *Stover v. Johnnycake*, 9 Kan. 367; *In re Carroll's Will*, 53 Wis. 228, 10 N. W. 375; *Scholey v. DeMattos*, 18 Wash. 504, 52 Pac. 242. See also *Spengler v. Hahn*, 95 Wis. 472, 70 N. W. 466.

²⁶ *Lomax v. Hide*, 2 Vern, 185; *Hunt v. Fownes*, 9 Ves. 70.

²⁷ *Bynum v. Frederick*, 81 Ala. 489, 8 So. 198; *Grogan v. Nolan* (Cal.) 36 Pac. 397; *L'Engle v. L'Engle*, 21 Fla. 13.

²⁸ *Grogan v. Nolan*, (Cal.) 36 Pac. 397.

²⁹ *Cheltenham Imp. Co. v. Whitehead*, 128 Ill. 279, 21 N. E. 569.

ment, out of the proceeds, of "all costs of foreclosure, including attorney's fee," this refers only to a foreclosure by sale under the power, and does not authorize the allowance of an attorney's fee for filing a bill to foreclose.³⁰

The supreme court of Oregon, in the case of *Balfour v. Davis*,³¹ say that a stipulation in a mortgage for the payment in a case of suit, of twenty per cent. on the amount due, as attorney's fees, whether judgment shall be recovered or not, is in violation of the rule of just compensation, as well as contrary to public policy, and that in such cases the court will not allow even a reasonable attorney's fee.

In an action for the foreclosure of a mortgage executed by a corporation, the plaintiff is not entitled to recover a counsel fee for such foreclosure, where the resolutions of the corporation, authorizing the loan and the execution of the mortgage, did not provide for the payment of a counsel fee, or that such fee should be secured by the mortgage.³²

§ 1008. Enforcement of counsel fee against purchaser.—

A covenant in a mortgage, that in case of foreclosure the mortgagor shall pay to the mortgagee a solicitor's fee, in addition to taxable costs in the suit, is enforceable not only against the mortgagor but also against a subsequent purchaser of the mortgaged premises.³³ Where the note which the mortgage is given to secure provides for an attorney's fee, such fee is a lien upon the land.³⁴

In the case of *Pierce v. Kneeland*,³⁵ the court say: "It is objected that the covenant could not be enforced against

³⁰ *Bynum v. Frederick*, 81 Ala. 489, 8 So. 198.

³¹ 14 Oreg. 47, 12 Pac. 89.

³² *Schallard v. Eel River Steam Nav. Co.* 70 Cal. 144.

³³ *Pierce v. Kneeland*, 16 Wis. 672, 84 Am. Dec. 720. But see *First Methodist Episcopal Church v. Fadden*, 8 N. D. 162, 77 N. W. 615.

³⁴ *County Bank of San Luis Obispo v. Goldtree*, 129 Cal. 160, 61 Pac. 785; *Corson v. McDonald*, 85 Pac. 861 (Cal. App.)

³⁵ 16 Wis. 672, 84 Am. Dec. 726. See *Weatherby v. Smith*, 30 Iowa, 131, 6 Am. Rep. 663.

subsequent purchasers. But we fail to see any good reason why it could not. In case of foreclosure, the property was bound for the payment of the one hundred dollars solicitor's fee as much as it was for the taxable costs. The defendants purchased the property subject to the incumbrances, and it is certainly strange that they can relieve themselves from conditions in the mortgage which were binding upon their immediate grantors."

The supreme court of the United States, in the case of *Meddaugh v. Wilson*,³⁶ say that where one of the purchasers of property at a foreclosure sale, which is subject to a charge thereon for the fees of the attorneys of an assignee in bankruptcy, has agreed to pay such fees out of a certain fund expected to be realized from a sale of the property, if that fund fails to be realized the property is not relieved from such charge, although the decree of sale was, by reason of such agreement, entered without any provision for the payment of such fees.

§ 1009. Allegation as to counsel fee.—The fee stipulated to be paid in a foreclosure, is additional to the costs recoverable by statute.³⁷ It is not essential that there should be an averment that the amount of the fee stipulated for in the mortgage is reasonable,³⁸ as it is a mere incident to the cause of action and may be fixed by the court in its discretion.³⁹

It has been said, that where a mortgage contains a stipulation that the mortgagee shall be entitled to an attorney's fee in any action that he may be compelled to bring on the mortgage, he may claim such fee when, as a defendant in the foreclosure of a prior mortgage, he sets up his cause of

³⁶ 151 U. S. 333, 38 L. ed. 183, 14 Sup. Ct. Rep. 356.

³⁷ *Gronfier v. Minturn*, 5 Cal. 492; *Carriere v. Minturn*, 5 Cal. 435.

³⁸ *McNamara v. Oakland Building*

& Loan Ass'c. 131 Cal. 336, 63 Pac. 670; *Damon v. Quinn*, 143 Cal. 75, 76 Pac. 218.

³⁹ *Carriere v. Minturn*, 5 Cal. 435.

action, because this is, in effect, bringing an action on the mortgage.⁴⁰ But the supreme court of Illinois held, in the case of *Soles v. Sheppard*,⁴¹ that such a stipulation does not apply to the filing of an answer or a cross bill by a mortgagee to a complaint to foreclose a mortgage.

A stipulation in a mortgage allowing a counsel fee in a foreclosure does not entitle the plaintiff to such counsel fee until he has paid it or become liable therefor.⁴² The mortgagee cannot recover such fee for personally prosecuting his own foreclosure;⁴³ consequently, an attorney who is the mortgagee, cannot recover such a fee in his own foreclosure.⁴⁴

§ 1010. When attorney's fee not allowed.—A counsel fee for foreclosing a mortgage will be allowed in no case, unless stipulated in the mortgage,⁴⁵ or expressly authorized by statute,⁴⁶ and even where it is so stipulated or authorized, such fee will not be allowed in the decree unless it is demanded in the bill or complaint.⁴⁷

A provision in a mortgage for an attorney's fee is not en-

⁴⁰ *Lanoue v. McKinnon*, 19 Kan. 408.

⁴¹ 99 Ill. 616.

⁴² *Bank of Woodland v. Treadland*, 55 Cal. 379; *Patterson v. Donner*, 48 Cal. 369; *Soles v. Sheppard*, 99 Ill. 616; *Reed v. Catlin*, 49 Wis. 686.

⁴³ *Patterson v. Donner*, 48 Cal. 369; *Reed v. Catlin*, 49 Wis. 686.

⁴⁴ *Patterson v. Donner*, 48 Cal. 369; *Sclater v. Cottam*, 3 Jur. N. S. 630; *Gantzer v. Schmeltz*, 206 Ill. 560, 69 N. E. 584; *Gray v. Robertson*, 174 Ill. 242, 51 N. E. 248. See also *Stein v. Kaun, as ex'x etc.* 244 Ill. 32, 91 N. E. 77; *Touhy v. McCagg, as ex'r etc.* 121 Ill. App. 93, 134 Ill. App. 56; *Gale v. Carter*, 154 Ill. App. 478.

⁴⁵ *Sichel v. Carrillo*, 42 Cal. 493; *Wylie v. Karner*, 54 Wis. 591; *John Brickell Co. v. Sutro*, 11 Cal. App. 460, 105 Pac. 948; *Goode v. Colorado Investment Loan Co.* 16 N. M. 461, 117 Pac. 856; *Shaw v. Smith, as assignee, etc.* 107 Md. 523, 69 Atl. 116.

⁴⁶ *Bockes v. Hathorn*, 17 Hun (N. Y.) 87; *Stover v. Johnnycake*, 9 Kan. 367.

⁴⁷ *Augustine v. Doud*, 1 Ill. App. 588; *Crowe v. Kennedy*, 127 Ill. App. 189; *Knight v. Heafer*, 79 Ill. App. 374.

In California no allegation is necessary. *Orange Growers' Bank v. Duncan*, 133 Cal. 254, 65 Pac. 469; *Thrasher v. Moran*, 146 Cal. 683, 81 Pac. 32.

forceable unless a sale is actually made.⁴⁸ Thus, it was held in *Jennings v. McKay*,⁴⁹ that a stipulation in a mortgage providing that "an attorney's fee of fifty dollars for foreclosure, with costs of suit and accruing costs," shall be taxed against the mortgagor, does not authorize such a fee unless a decree for foreclosure is entered; if the mortgagor pays the debt after the action is commenced, but before a decree of sale is entered, the fee cannot be collected. It has been held, that under a provision in a power of sale for an attorney's fee in case of foreclosure, no allowance can be made if the mortgage is foreclosed in chancery instead.⁵⁰

The supreme court of Maryland held, in the case of *Maus v. McKellip*,⁵¹ that fees paid to counsel for resisting an application by the assignee in bankruptcy of the mortgagor to enjoin a sale under a power contained in the mortgage, do not constitute a payment in defense of the mortgage title. A defendant in a foreclosure who does not seek to redeem, but who claims the land by a superior title, is not in a position to object to the amount of an attorney's fee allowed by the court.⁵²

§ 1011.—Costs on redeeming.—It is said in the case of *Benedict v. Gilman*,⁵³ that upon the redemption of mortgaged premises by a judgment creditor, after a statutory foreclosure, he is not bound to pay the costs of such foreclosure; but the general rule is that a party who is permitted to redeem mortgaged premises, whether he is a plaintiff or a defendant

⁴⁸ *Myer v. Hart*, 40 Mich. 517, 25 Am. Rep. 553.

⁴⁹ 19 Kan. 120, distinguishing *Life Association v. Dale*, 17 Kan. 185. See *Schmidt v. Potter*, 35 Iowa, 426; *Collar v. Harrison*, 30 Mich. 66.

⁵⁰ *VanMarter v. McMillan*, 39 Mich. 304; *Hardwick v. Bassett*, 29 Mich. 17; *Sage v. Riggs*, 12 Mich.

313. See also *First National Bank v. Tamble*, 62 S. W. 308 (Tenn.) But see *British & American Mortgage Co. Ltd. v. Worrill*, 168 Fed. 120 (Ga.)

⁵¹ 38 Md. 231.

⁵² *Winnebago County v. Brones*, 68 Iowa, 682.

⁵³ 4 Paige Ch. (N. Y.) 58

in the suit, must pay the costs of the suit in addition to the amount due on the mortgage.

Where the purchaser under a statutory foreclosure makes valuable and permanent improvements upon the premises, under the belief that he has a good title, and without notice of the existence of a judgment which is a lien upon the equity of redemption, the judgment creditor applying to redeem, must, in addition to the amount due upon the mortgage, pay the enhanced value of the premises arising from such improvements.⁵⁴

§ 1012. Foreclosure under power—Mortgagee's compensation.—Under a power of sale contained in a mortgage, reasonable and proper expenses incurred in advertising a sale under such power will always be allowed, whether or not an express provision therefor is made in the mortgage;⁵⁵ and this, it is thought, will always include a reasonable sum for legal advice regarding the sale and an attorney's fee for preparing the notice of sale.⁵⁶

Where, however, the sale is not compelled, and the advertisement, being imperfect, is withdrawn after a single publication, no costs or attorney's fees can be collected.⁵⁷ Where a sale is enjoined, after it is advertised, and the mortgagee or trustee, in anticipation of the action of the court, incurs expenses in advertising an adjournment of the sale, he will not be entitled to have such expenses allowed, on the dissolution of the injunction.⁵⁸

⁵⁴ *Benedict v. Gilman*, 4 Paige Ch. (N. Y.) 58. See *Bradley v. Snyder*, 14 Ill. 265, 58 Am. Dec. 564.

⁵⁵ *Collins v. Standish*, 6 How. (N. Y.) Pr. 493; *Allen v. Robbins*, 7 R. I. 33; *Fearn v. Young*, 10 Ves. 184; *Worrall v. Harford*, 8 Ves. 4.

⁵⁶ *Marsh v. Morton*, 75 Ill. 621; *Varnum v. Meserve*, 90 Mass. (8

Allen) 158. See *Swift v. Board of County Com'rs. of Hennepin Co.* 76 Minn. 194, 78 N. W. 1107.

⁵⁷ See *Collar v. Harrison*, 30 Mich. 66; *Whitaker v. Old Dominion Guano Co.* 123 N. C. 368, 31 S. E. 629.

⁵⁸ *Marsh v. Morton*, 75 Ill. 621. See *Collins v. Standish*, 6 How. N.

§ 1013. **Expenses and disbursements of trustee.**—The holder of a mortgage, containing a power of sale, on foreclosing under such power, is regarded as a trustee, and under the general rule applicable to trustees, that they shall not be permitted to profit by their trust, he will not be entitled to recover compensation for his services, in the absence of a special agreement providing therefor.⁵⁹

Provision may be made in the mortgage or trust deed for compensation to the mortgagee or trustee, and in such a case the agreement of the parties will govern. Where a provision is inserted, securing the mortgagee or trustee a commission for his services in selling the property, such compensation will be allowed, in addition to his ordinary expenses and counsel fees.⁶⁰ The mere fact, however, that a party is named as trustee in a deed of trust raises no implied promise on the part of the beneficiary to pay him for his services.⁶¹

§ 1014. **Taxing costs and disbursements on foreclosure by advertisement.**—The New York Code of Civil Procedure provides,⁶² that costs, in addition to necessary expenses provided for, shall be allowed as follows, in a statutory foreclosure: “(1) For drawing a notice of sale, a notice of the postponement of a sale, or an affidavit, made as prescribed in this title, for each folio, twenty-five cents; for making each necessary copy thereof, for each folio, thirteen cents. (2) For serving each copy of the notice of sale, required or ex-

Y.) Pr. 493. See also *Felgner's Administrators v. Slingluff*, 109 Md. 474, 71 Atl. 978.

⁵⁹ *Allen v. Robbins*, 7 R. I. 33. See *Lime Rock Bank v. Phetteplace*, 8 R. I. 56; *Catlin v. Glover*, 4 Tex. 151; Sugden on Vendors, 55; also *Parshall's Appeal*, 65 Pa. St. 233; *Sloo v. Law*, 3 Blatchf. C. C. 459; *Duffy v. Smith*, 132 N. C. 38, 43 S. E. 501. See also *Elkin v. Rives*, 82

Miss. 744, 35 So. 200; *Fry v. Graham*, 122 N. C. 773, 30 S. E. 330. But see *Harris v. First National Bank*, 45 S. W. 311 (Tex.)

⁶⁰ *Lime Rock Bank v. Phetteplace*, 8 R. I. 56. See *Varnum v. Meserve*, 90 Mass. (8 Allen) 158; *Loftis v. Duckworth*, 146 N. C. 343, 59 S. E. 689.

⁶¹ *Catlin v. Glover*, 4 Tex. 151.

⁶² N. Y. Code Civ. Proc. § 2401.

pressly permitted to be served by this title, and for affixing each copy thereof, required to be affixed upon the court house, as prescribed by this title, one dollar. (3) For superintending the sale, and attending to the execution of the necessary papers, ten dollars.”⁶³

A charge for drawing the notice, for making an office copy to keep, and for a copy for the printer, is proper;⁶⁴ and it is proper to charge for thirteen weeks' publication.⁶⁵ But a charge cannot be made for a copy of the notice served on the auctioneer, when he is also the counsel of the mortgagee.⁶⁶

Where the mortgagee neglected to serve the notice of sale on the necessary parties, and the sale had to be postponed for that reason, the court held that such mortgagee could not tax the costs of the sale first attempted.⁶⁷ In taxing costs in such a foreclosure, matter inserted in the notice which is not required by statute, should be excluded in determining the number of folios to be allowed; and no charge should be allowed for serving the notice on parties not required by statute to be served.⁶⁸

§ 1015. What disbursements allowed.—On foreclosure of a mortgage an allowance will be made the plaintiff for expenses and services in the prosecution of the suit, where they are provided for in the mortgage;⁶⁹ this will include the amount paid for advertising and posters for the sale of the mortgaged property.⁷⁰ And a second mortgagee has a

⁶³ *Collins v. Standish*, 6 How. (N. Y.) Pr. 493, 495.

⁶⁴ *Ferguson v. Wooley*, 9 N. Y. Civ. Proc. Rep. 236.

⁶⁵ *Ferguson v. Wooley*, 9 N. Y. Civ. Proc. Rep. 236.

⁶⁶ *Ferguson v. Wooley*, 9 N. Y. Civ. Proc. Rep. 236.

⁶⁷ *Hornby v. Cramer*, 12 How. (N. Y.) Pr. 490; *Ferguson v.*

Wooley, 9 N. Y. Civ. Proc. Rep. 236.

⁶⁸ *Ferguson v. Wooley*, 9 N. Y. Civ. Proc. Rep. 236.

⁶⁹ *Mercantile Trust Co. v. Missouri, K. & T. R. Co.* 41 Fed. 8, 7 Ry. & Corp. L. J. 30.

⁷⁰ *Snow v. Warwick Sav. Inst.* 17 R. I. 66, 20 Atl. 94.

If an auctioneer employed to sell

right, on foreclosure of his mortgage, to collect the interest paid by him upon the first mortgage, but is not entitled to an assignment of any share of such mortgage.⁷¹ But where a second mortgagee foreclosed and purchased at the sale, without making the first mortgagee a party, and subsequently the latter pays an assessment for street improvements binding on the property, but not on the purchaser personally, the one so paying cannot recover the amount paid from the purchasing mortgagee.⁷² And it is said by the supreme court of New York, in the case of *Parker v. Collins*,⁷³ that a mortgagee who has advanced, upon the faith of his mortgage, moneys to procure the assignment to himself of a claim against the mortgagor, and not to pay the debt, stands in the same position as his assignor in respect to the right of the mortgagor to question the amount of the claim.

The New York Code provides,⁷⁴ that there shall be an allowance for disbursements, not exceeding the fees allowed by law for those services, as follows: "(1) For publishing the notice of sale, and the notice or notices of postponement, if any, for a period not exceeding twenty-four weeks. (2) For the services specified in section 2390 of this act. (3) For recording the affidavits; and also, where the property sold is situated in two or more counties, for making and recording the necessary certified copies thereof. (4) For necessary postage and searches."⁷⁵

mortgaged property is absent and sends another auctioneer in his place under a special contract, the mortgagee, as expenses incurred for the sale of the property, is entitled only to the amount paid to the auctioneer who sold it, and not to the amount which would have been due to the other if he had performed his agreement. *Snow v. Warwick Sav. Inst.* 17 R. I. 66, 20 Atl. 94.

⁷¹ *Magilton v. Holbert*, 52 Hun (N. Y.) 444, 24 N. Y. S. R. 96, 5 N. Y. Supp. 507.

⁷² *Mutual L. Ins. Co. v. Sage*, 41 Hun (N. Y.) 535.

⁷³ 127 N. Y. 185, 27 N. E. 825, 38 N. Y. S. R. 269.

⁷⁴ N. Y. Code Civ. Proc. § 2402.

⁷⁵ *Collins v. Standish*, 6 How. (N. Y.) Pr. 493.

§ 1016. Who may require taxation of costs and disbursements.—Any party, who is liable for the costs of the foreclosure, may require such costs to be taxed. Thus, it has been held, that a party who claims the surplus, as an heir at law of the mortgagor, and who has been recognized as a claimant, by being made defendant in an action of interpleader to determine the ownership of the surplus, is a party liable to pay the costs, and, as such, entitled to require their taxation.⁷⁶

The New York Code provides,⁷⁷ that “costs and expenses must be taxed, upon notice, by the clerk of the county where the sale took place, upon the request and at the expense of any person interested in the payment thereof. Each provision of this act relating to the taxation of costs in the supreme court, and the review thereof, applies to such a taxation.”⁷⁸

It is said in *Ferguson v. Wooley*,⁷⁹ that devisees, under the recorded will of a deceased mortgagor, and a lessee, under a recorded lease, may be deemed grantees who should be served with the notice of sale; where such devisees are minors under fourteen years of age, a notice should also be served on their guardian, and such service may be charged for.

§ 1017. Costs in surplus proceedings.—In proceedings for the distribution or surplus moneys, motion fees, fees of the referee, and disbursements, are all the costs that can be granted to the successful party.⁸⁰ The hearing before the

⁷⁶ *In re Moss*, 6 How. (N. Y.) Pr. 263.

⁷⁷ N. Y. Code Civ. Proc. § 2403.

⁷⁸ The statute clearly contemplates a taxation in such manner that the parties can be heard, and not an *ex parte* taxation. *In re Moss*, 6 How. (N. Y.) Pr. 263.

⁷⁹ 9 N. Y. Civ. Proc. 236.

⁸⁰ *Borland v. Alleond*, 8 Daly (N. Y.) 126; *New York Life Ins. & Trust Co. v. Vanderbilt*, 12 Abb.

(N. Y.) Pr. 458; *In re Gibbs*, 58 How. (N. Y.) Pr. 502; *Elwell v. Robbins*, 43 How. (N. Y.) Pr. 108; *German Sav. Bank v. Sharer*, 25 Hun (N. Y.) 409; *McDermott v. Hennesy*, 9 Hun (N. Y.) 59; *Hebrank v. Colell*, 2 N. Y. Month. L. Bul. 39; *Dudgeon v. Smith*, 23 N. Y. Week. Dig. 400; *Wellington v. Ulster County Ice Co.* 5 N. Y. Week. Dig. 104. In *Elwell v. Robbins*, 43 How. (N. Y.) Pr. 108, it

referee is not a trial, and no extra allowance can be made therefor.⁸¹ The reason for this, is thought to be, that proceedings for the distribution of surplus moneys arising in a foreclosure by action, are not special proceedings, but are proceedings in the action and a part of it.⁸²

In *Elwell v. Robbins*,⁸³ Balcom, J., said: "It was held in *New York Life Insurance & Trust Company v. Vanderbilt*.⁸⁴ that in disposing of surplus funds arising on the foreclosure of a mortgage, the court has authority to allow to the parties a suitable compensation for costs and disbursements, to be paid out of the funds, in addition to the taxable costs. This is a special proceeding. It is provided by statute that in special proceedings, costs may be allowed in the discretion of the court, and when allowed, shall be at the rate allowed for similar services in civil actions.⁸⁵ The claimants to the surplus moneys are entitled to the fees of the referee and the fees of the clerk in the proceeding. The only costs, aside from disbursements, that can be allowed the claimants, at the rate allowed for similar services in civil actions, are such as are prescribed by the Code. The attorney of the claimants has made two motions in this proceeding, one for the appointment of the referee, and the other for the confirmation of his report. And by section 315 of the Code, not exceeding \$10 for each motion can be allowed the claimants, or their attorney, in the discretion of the court. I will not say but there may be made cases where the proceedings before the referee should

was held that two motion fees might be allowed in such proceedings, one on the appointment of a referee and the other on the confirmation of his report.

⁸¹ See *Borland v. Alleond*, 8 Daly (N. Y.) 126; *In re Gibbs*, 58 How. (N. Y.) Pr. 502; *Elwell v. Robbins*, 43 How. (N. Y.) Pr. 108; *German Sav. Bank v. Sharer*, 25 Hun (N. Y.) 409; *McDermott v. Hennesy*,

9 Hun (N. Y.) 59; *Dudgeon v. Smith*, 23 N. Y. Week. Dig. 400; *Wellington v. Ulster County Ice Co.* 5 N. Y. Week. Dig. 104.

⁸² *Mutual Life Ins. Co. v. Bowen*, 47 Barb. (N. Y.) 618; *In re Gibbs*, 58 How. (N. Y.) Pr. 502, 504.

⁸³ 43 How. (N. Y.) Pr. 108.

⁸⁴ 12 Abb. (N. Y.) Pr. 458.

⁸⁵ Laws of 1854, chap. 270, § 3.

be regarded in the nature of a trial, and a trial fee allowed to the claimant of the surplus moneys in the discretion of the court."

§ 1018. Who entitled to costs in surplus proceedings.—

The successful applicant for surplus moneys is entitled to have his costs taxed to the extent set forth in the preceding section; and where on a complaint to foreclose a mortgage, the widow of the mortgagor is made a party and answers and submits to the decrees of the court, she is entitled to one-third of the surplus proceeds of the sale of the mortgaged premises remaining in court, after satisfying the mortgage debt, as her equitable dower, and to have her costs paid out of the other two-thirds.⁸⁶

§ 1019. Who chargeable with costs in surplus proceedings.—Generally the costs and expenses of the proceedings for the distribution of surplus moneys are properly chargeable against the proceeds of the mortgage sale;⁸⁷ but where the facts are such as to make another rule more equitable, they may be charged against a party individually.⁸⁸

Where the surplus is small, and unsuccessful claimants have caused unnecessary expenses, they may be charged personally with the costs;⁸⁹ parties litigating in good faith, how-

⁸⁶ *Tabele v. Tabele*, 1 Johns. Ch. (N. Y.) 45. See *Hawley v. Bradford*, 9 Paige Ch. 200, 37 Am. Dec. 390.

⁸⁷ *Oppenheimer v. Walker*, 3 Hun (N. Y.) 31, 5 T. & C. (N. Y.) 325.

⁸⁸ *Lawton v. Sager*, 11 Barb. (N. Y.) 349; *Bevier v. Schoonmaker*, 29 How. (N. Y.) Pr. 411.

⁸⁹ *Lawton v. Sager*, 11 Barb. (N. Y.) 349; *Bevier v. Schoonmaker*, 29 How. (N. Y.) Pr. 411.

Chancery rule 136 also provided, in respect to costs on the reference, that any person making a claim to

the surplus moneys upon a sale of mortgaged premises, who should fail to establish his claim on the reference before the master, might be charged with such costs, as the other parties were subjected to by reason of such claim. And the parties succeeding in the reference might be allowed such costs as the court should deem reasonable; but no costs, unnecessarily incurred on such reference, or previous thereto, by any of the parties, could be allowed on taxation or paid out of such surplus.

ever, will not usually be so charged.⁹⁰ Thus, it has been held that a claimant who litigates a prior lien unsuccessfully and in good faith, is not chargeable with costs; but if he files exceptions which are overruled, he will be required to pay the costs of the appeal.⁹¹ And if a creditor makes claim to a larger amount than is found upon the reference to be owing to him, or if he adopts an unusual and expensive method of procedure, he may be charged with the costs.

When a junior incumbrancer, who has sufficient reason to believe that the prior lien will exhaust the surplus, files his claim and subjects the prior incumbrancer to unnecessary costs, he will be required to pay such costs. The rule is different, however, where he acts in good faith and has sufficient reason to believe that the prior lien will not exhaust the surplus.⁹² It has been held that a creditor who was not made a party to the suit, and who files a claim to the surplus, will be required to pay the costs of proving his claim.⁹³

§ 1020. Disbursements in surplus proceedings.—Although disbursements, in an action to foreclose a mortgage, are not costs in the strict sense of the word, yet they may be regarded as discretionary, and the courts usually allow disbursements not legally chargeable as costs, if they are for services actually rendered and are reasonable in amount.⁹⁴

Disbursements usually include advancements necessary to remove prior incumbrances and to protect the rights and interests of the mortgagee;⁹⁵ also taxes, assessments and insur-

⁹⁰ *Farmers' Loan & Trust Co. v. Millard*, 9 Paige Ch. (N. Y.) 620; *Norton v. Whiting*, 1 Paige Ch. (N. Y.) 578.

⁹¹ *De LaVergne v. Evertson*, 1 Paige Ch. (N. Y.) 181, 19 Am. Dec. 411.

⁹² *Farmers' Loan & Trust Co. v. Millard*, 9 Paige Ch. (N. Y.) 620.

⁹³ *Abell v. Screech*, 10 Ves. 355. See *Lawton v. Sager*, 11 Barb. (N.

Y.) 349; *Bevier v. Schoonmaker*, 29 How. (N. Y.) Pr. 411, 422.

⁹⁴ *Benedict v. Warriner*, 14 How. (N. Y.) Pr. 568; *Gallagher v. Egan*, 2 Sandf. (N. Y.) 742.

⁹⁵ *Hill v. Eldred*, 49 Cal. 398. See *Marshall v. Davies*, 78 N. Y. 414; *Williams v. Townsend*, 31 N. Y. 411; *Robinson v. Ryan*, 25 N. Y. 320; *Eagle Fire Ins. Co. v. Pell*, 2 Edw. Ch. (N. Y.) 631; *Brevoort v.*

ance paid by the mortgagee.⁹⁶ This rule is applicable although the mortgage may not contain a tax clause;⁹⁷ and a mortgagee has a right to pay insurance premiums for the protection of the estate mortgaged, and to add the amount paid to the mortgage debt, independently of an express agreement authorizing such payment.⁹⁸

The supreme court of California, in the case of *Glide v. Dwyer*,⁹⁹ hold that a trustee named in a mortgage, who, with his own funds, purchased a first mortgage on a portion of the premises covered by the trust mortgage, is entitled, on foreclosure of such mortgage, to the amount so expended by him, out of the proceeds of the entire premises. It is the universal rule that a mortgagee who pays taxes on the mortgaged property because of default of the mortgagor in making the payments should be allowed the amount in his foreclosure suit.¹ And where the mortgage provides for the payment out of the

Randolf, 7 How. (N. Y.) Pr. 398; *Burr v. Veeder*, 3 Wend. (N. Y.) 412; *Hughes v. Johnson*, 38 Ark. 296.

⁹⁶ *Sidenberg v. Ely*, 90 N. Y. 257, 43 Am. Rep. 163; *Williams v. Townsend*, 31 N. Y. 411; *Kortright v. Cady*, 5 Abb. (N. Y.) Pr. 358, 23 Barb. (N. Y.) 490; *Mix v. Hotchkiss*, 14 Conn. 32; *Wright v. Langley*, 36 Ill. 381.

⁹⁷ *Sidenberg v. Ely*, 90 N. Y. 257, 43 Am. Rep. 163. *In re Bogart*, 28 Hun (N. Y.) 466; *Cook v. Kraft*, 3 Lans. (N. Y.) 512. Compare *Faure v. Wynans*, Hop. Ch. (N. Y.) 283, 14 Am. Dec. 545; *Barthell v. Syver-son*, 54 Iowa. 160; *Savage v. Scott*, 45 Iowa, 130; *Manning v. Tuthill*, 30 N. J. Eq. (3 Stew.) 29.

⁹⁸ *In re Bogart*, 28 Hun (N. Y.) 466, 469.

⁹⁹ 83 Cal. 477, 23 Pac. 706.

¹ *Jackson v. Relf*, 26 Fla. 465, 8

So. 184. See *German Sav. & L. Soc. v. Hutchinson*, 68 Cal. 52, 8 Pac. 627; *Windett v. Union Mut. L. Ins. Co.* 144 U. S. 581, 36 L. ed. 551, 12 Sup. Ct. Rep. 751; *Gormley v. Bunyan*, 138 U. S. 623, 34 L. ed. 1086, 11 Sup. Ct. Rep. 453.

Upon a sale under a trust deed containing a covenant to pay all taxes and assessments on the property, the amount necessary to pay off the taxes, if not advanced before the sale, can be properly taken out of the proceeds. *Gormley v. Bunyan*, 138 U. S. 623, 34 L. ed. 1086, 11 Sup. Ct. Rep. 453.

School taxes cannot participate in the distribution of the proceeds of a mortgage sale under Pennsylvania Local Act April 11, 1866, making such taxes a lien on realty, but not providing for their payment out of the proceeds of sale. *Barclay v. Leas*, 9 Pa. Co. Ct. 314.

proceeds of the sale of the mortgaged property all moneys advanced for taxes, the mortgagee is entitled to be repaid the sums expended by him to extinguish tax titles, and is not obliged to contest them, where it was obligatory on the mortgagor to pay the taxes.² On the same principle all payments of taxes and street assessments, made under authority given in the mortgage, after presentation of the claim against the estate of a deceased mortgagor, are properly allowable on foreclosure made without presentation.³

Whether or not taxes for the current year upon property purchased upon mortgage foreclosure should be paid by the purchaser, or out of the funds derived from the sale, depends upon whether or not such taxes were a lien on the property at the time of the sale;⁴ for the general rule is that a mortgagee who becomes the purchaser at a foreclosure sale takes the land subject to taxes which were levied upon the property after the mortgage was given.⁵

§ 1021. Same — Expenses for search — Unofficial search.—The court of appeals of New York, in the case of *The Equitable Life Assurance Society v. Hughes*,⁶ say that the expense of an unofficial search made by a title insurance company is not taxable as part of the disbursements on foreclosure of a mortgage, "according to the course and practice of the court," there being no express provision of law al-

² *Windett v. Union Mut. Ins. Co.* 144 U. S. 581, 36 L. ed. 551, 12 Sup. Ct. Rep. 751.

The lien of taxes alleged to have been paid by a mortgagee, and his privilege of subrogation to the rights of the state, cannot be enforced against the proceeds when marshaled for distribution, without clear proof that the taxes were paid, with the amounts and years stated. *Brady v. His Creditors*, 43

La. Ann. 165, 9 So. 59.

³ *German Sav. & L. Soc. v. Hutchinson*, 68 Cal. 52, 8 Pac. 627.

⁴ *Cutting v. Tavares, O. & A. R. Co.* 61 Fed. 150.

⁵ *Wooten v. Sugg*, 114 N. C. 295, 19 S. E. 148.

⁶ 125 N. Y. 106, 26 N. E. 1, 34 N. Y. S. R. 591, 19 Civ Proc. Rep. 326, 11 L.R.A. 280. See also *Mayer v. Jones*, 132 App. Div. 106, 116 N. Y. Supp. 300.

lowing such item, although the expense of an official search by a county clerk can be taxed.⁷ A reasonable amount

⁷ In this case, at the commencement of the action to foreclose, the plaintiff's attorney obtained a search of the title of the mortgaged premises from the Lawyers' Title Insurance Company of New York, a corporation organized under the laws of New York. N. Y. Laws, 1885, c. 538. The plaintiff claimed the sum paid for this search should be taxed, as lawful disbursement, in the bill of costs. Mr. Justice Earl, who writes the opinion of the court, discusses the question very fully, reviewing the statutes and authorities. He says, in part:

"There is nothing in the act under which the Lawyers' Title Insurance Company was organized making its searches official, or its certificates as to title evidence in any court. The searches made by it have no greater force or value in the law than an unofficial search made by an individual; and unless the plaintiff would have been entitled to the taxation of this item if the search and charge therefor had been made by an individual, its claim fails. At common law, neither costs nor disbursements were allowed to the prevailing party in any case, and their allowance has always been regulated by statute. Unless, therefore, the plaintiff can point to some statute authorizing the clerk to allow and tax this item, the decision below is right. After costs and disbursements were allowed by law, they were confined to certain fees payable to counselors, solicitors, and attorneys, and to payments made to officers who

were entitled to charge fees for official services, and to the legal fees of witnesses. The first comprehensive statute in this state which we have been able to find regulating the fees of attorneys, counselors, solicitors and public officers, is the act of 1801. N. Y. Laws, 1801, c. 190. That act was re-enacted, with some amendments, in the Revised Laws of 1813. 2 N. Y. Rev. Laws, 1813, p. 3. In these statutes, minute provisions were made for the fees of attorneys, counselors, solicitors, officers and witnesses, and the fees thus specified were all the fees which were taxable in favor of any party entitled to recover them. The whole subject of fees was again regulated by the Revised Statutes, N. Y. Rev. Stat. pt. III. c. 10, titles, 3, 4, and in all these statutes it was made illegal and criminal for any officer or person to take or exact any other or greater fee than that specified in the law. Section 30, title 3, contained a general provision, as follows: 'The actual disbursements of a solicitor in the court of chancery, or of an attorney in the supreme court, necessarily incurred in cases not herein specified, which shall be proved by affidavits and shall be deemed reasonable by the taxing officer, may be allowed in the taxation of costs.' A similar clause, in the following language, was contained in the Revised Laws of 1813. 2 N. Y. Rev. Laws (1813), p. 13. And the solicitor is to be allowed, in the taxation of costs, for all postage and other disbursements

expended for searches for taxes may be included by the referee

actually and necessarily incurred or paid in the cases not specified.' The precise scope of the clause, 'necessarily incurred or paid in the cases not specified,' is not entirely plain; but we believe it has always been construed to mean the fees of officers,—fees of same character as those mentioned, though not specified; and these general clauses have never been held to extend further. The sums disbursed by solicitors and attorneys for stationery, blanks, for traveling and tavern expenses, and for many other purposes, are necessary, and yet it has never been supposed, that, under the general language above quoted, such items were taxable as disbursements.

"In *Kenney v. Vanhorne*, 2 John. (N. Y.) 108, it was held that the expenses of executing a commission were not to be taxed, because they were not within the provisions of the act regulating taxable costs and disbursements. In that case the court said: 'The preparing or making up of cases for argument in the cause is not comprehended in any of the particular services specified in the act; and unless it comes within some one of the services provided for by the act, it cannot be taxed;' thus showing that, in the opinion of the court at that time, nothing could be taxed except what was particularly specified in the act.

"In *Hovey v. Hovey*, 5 Paige Ch. (N. Y.) 551, it was held that the solicitor was not entitled to have taxed the expense of ascertaining the residence of the defendants as a necessary disbursement, and that the only disbursements which were properly taxable under the pro-

visions in the fee bill were disbursements by the solicitors for postage, for exemplifications to be used in the suit, for necessary searches in the public officers, for the publication of notices required by law or the practice of the court, and other disbursements of a like nature. The chancellor said: 'There are many cases of disbursements by an attorney or solicitor for the benefit of his client, which are not taxable against the adverse party as costs in the cause, but which form a proper subject of allowance to the attorney or solicitor as against his own client.' The Code of Civil Procedure (N. Y. Code Civ. Proc. § 3256) now specifies the disbursements which a party entitled to costs may include in his bill, and it is as follows: 'A party to whom costs are not awarded in an action is entitled to include in his bill of costs his necessary disbursements, as follows: The legal fees of witnesses, and of referees and other officers; the reasonable compensation of commissioners taking depositions; the legal fees for publication, where publication is directed, pursuant to law; the legal fees paid for a certified copy of a deposition or other paper recorded or filed in any public office, necessarily used or obtained for use on the trial; the reasonable expenses of printing the papers for a hearing when required by a rule of the court; prospective charges for the expenses of entering and docketing the judgment, and the sheriff's fees for receiving and returning one execution thereon, including the search for property and such other

in his expenses of sale, but it forms no part of the costs of foreclosure for which judgment may be entered.^{7a}

reasonable and necessary expenses as are taxable according to the course and practice of the court, or by express provision of law.' There is certainly nothing in this section which authorizes the taxation of this item, unless it be the last clause, and thus we are brought to the inquiry whether the item is taxable 'according to the course and practice of the court, or by express provision of law.' We are pointed to no express provision of law, and the sole inquiry, therefore, is whether it is taxable 'according to the course and practice of the court.' The supreme court, which must be presumed to be familiar with its own practice, holds that it is not thus taxable. This, the court could have determined from its own knowledge, without any other evidence. But its decision is amply supported by the evidence placed before it, and we can perceive no ground upon which we can reverse it. We are not presumed to know as well as that court the practice which prevails therein in such cases.

"There is no countenance for the taxation of this seen in any of the authorities to which our attention is here called. In *Perry v. Griffin*, 7 How. (N. Y.) Pr. 263, it was held that nothing can be allowed on the taxation of costs for money paid to a commissioner to take testimony in another state, and for witnesses attending before the commissioner. A different rule was, however, laid down in *Finch v. Calvert*, 13 How. (N. Y.) Pr. 13, where it was held that the word 'disbursements,' mentioned in the Code, N. Y. Code Civ.

Proc. § 311, has a more extensive meaning under the present than under the former system, and includes necessary expenses in executing a commission in a foreign state. In *Case v. Price*, 17 How. (N. Y.) Pr. 348, it was held that the plaintiff in a foreclosure suit who employs a constable or private person to serve a summons and complaint and notice of the object of the action may recover, as disbursements, a reasonable sum for such service. In *Pierrepont v. Loveless*, 4 Hun (N. Y.) 681, the expenses incurred by a party in serving subpoenas upon witnesses were not allowed as necessary disbursements. In *Provost v. Farrell*, 13 Hun (N. Y.) 303, the fees paid to a stenographer, and for the preparation of maps to be used on the trial, were refused taxation as costs, although the law at that time empowered the courts to appoint stenographers, and regulated the price which they could charge for copies of notes. In *Colton v. Simmons*, 14 Hun (N. Y.) 75, it was held that compensation paid by the prevailing party to the stenographer for his services at the trial, cannot be taxed as costs. In *Rothery v. New York Rubber Company*, 24 Hun (N. Y.) 172, it was decided that a party could not include in his bill of costs the amount paid to the surveyor for making the survey and plans used on the trial. That decision was affirmed in this court. *Rothery v. The New York Rubber Co.* 90 N. Y. 30. In *Pfaudler v. Sargent*, 43 Hun (N. Y.) 154, the fees of a stenographer for a copy

§ 1022. **Interest on advancements.**—The supreme court of Iowa, in the case of *Butterfield v. Hungerford*,⁸ say that where a mortgagee pays taxes and other prior claims to protect his own lien, he should not be allowed more than 6 per cent. per annum interest on such advances, as against a junior incumbrancer in a foreclosure proceeding, though he may have an agreement for 10 per cent, with the mortgagor.

§ 1023. **Interest on costs.**—When costs in a mortgage foreclosure are adjudicated and directed to be added to the security, that is equivalent to directing them to be charged on the estate⁹ and they will carry interest from the date of the taxing, but not from that of the order of the court.¹⁰ This is on the theory that a debt secured by a legal or an equitable mortgage will, unless something is said or may be implied to the contrary, carry interest; and it is thought to follow as a corollary that, when the court has once decided that there is a charge, the sum charged must bear interest.¹¹ But it is thought that interest on the costs under the judgment of foreclosure and decree of sale cannot be charged against

of his minutes were held not to be taxable as costs, even when procured by party to enable him to propose amendments to the case. In *Mark v. Buffalo*, 87 N. Y. 185, it was held that sums paid for plans and measurements, and compensation to experts, beyond their fees as witnesses, were not properly taxable as necessary disbursements. There is no warrant in these authorities for holding that the expense of an unofficial search can be allowed as a disbursement."

^{7a} *Mayer v. Jones*, 132 App. Div. 106, 116 N. Y. Supp. 300.

⁸ 68 Iowa, 249, 26 N. W. 136.

⁹ *Eardley v. Knight*, L. R. 41 Ch. Div. 537, 540, 61 L. T. N. S. 780, 781.

¹⁰ *Eardley v. Knight*, L. R. 41 Ch. Div. 537, 540, 61 L. T. N. S. 780, 781; *Lippard v. Ricketts*, L. R. 14 Eq. 241. But see *Healy v. Protection Mutual Fire Ins. Co.* 213 Ill. 99, 72 N. E. 678.

¹¹ *Lippard v. Ricketts*, L. R. 14 Eq. 241; *In re Kerr's Policy*, L. R. 8 Eq. 331.

Equitable mortgages bear interest.—*In re Kerr's policy*, *supra*, it was held that where a simple contract debt has been secured by deposit of title deeds, unaccompanied by any stipulation as to interest, or by any memorandum from the terms of which the exclusion of a right to recover interest can be inferred, the mortgagee is entitled to interest on the debt. To the same

the estate in those cases where they are not directed by the court to be added to the amount secured.¹²

effect is *Casey v. Doyne*, 5 Ir. Ch. 104.

¹² Interest on the costs allowed in foreclosure was asked for in the case of *Eardley v. Knight*, L. R. 41 Ch. Div. 537, 61 L. T. N. S. 780, 781, and Mr. Justice Kay said: "The defendants claim interest on those costs; that is to say, on costs in a foreclosure action. For that I find no principle or authority. If that were allowed in every case of foreclosure, the mortgagor could not redeem until payment, not only of principal, interest and costs, but also of interest on costs. I never heard of any such rule. But here it is said that there has been a decision at common law in the case of *Pyman v. Burt*, W. N. 1884, p. 100, that . . . the costs should carry interest. But it does not follow that the costs are a charge on the estate. The costs must be got from the mortgagor personally, not charged on the estate. Then I am told the judgment in the present case was the subject of appeal, and

that the appeal was dismissed with costs, the order of the Court of Appeals directing that the costs of the appeal should be paid by the plaintiff to the defendants, and that the costs remaining unpaid by the plaintiff might be added by the defendants to their security. Adding the costs to the security was of course adding them to the capital moneys, and treating them as charged on the estate, and I have the authority of *Lifford v. Ricketts*, L. R. 14 Eq. 291, 41 L. J. Ch. 595, which is a decision that, where costs are directed to be added to moneys secured by a deed, and to stand charged on the property comprised in the deed, the costs carry interest." (*Pyman v. Burt*, was a case where the mortgagor had brought an action to set aside the mortgage, which action was dismissed with costs, and on the counterclaim the usual foreclosure decree was made, and an account directed as to what was due the defendants under the mortgage.).

CHAPTER XXXVII.

REDEMPTION—NATURE AND EXTENT OF RIGHT.

- § 1024. Definition of redemption.
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- § 1050. Merger of mortgage in equity of redemption.
- § 1051. Redemption money—Lien for.
- § 1052. On sale under power.
- § 1053. Extinguishment of right of redemption.
- § 1054. Same—By action and sale.

§ 1024. Definition of redemption.—Literally speaking, the word redemption signifies the act of redeeming, or the state of being redeemed; a ransom, a purchase, a deliverance, a re-

lease. It comes from the Latin word *redimere*, to buy back.¹³ In law, the redemption of lands signifies the recovering or disencumbering of property by one who had a right or an interest—either legal or equitable—therein, subject to the lien of the incumbrance, or a defeasible conveyance.¹⁴

§ 1025. **Right of redemption.**—The right of redemption is the right of the mortgagor, or any one who has a legal or equitable interest in the land, to satisfy the mortgage and have the estate discharged therefrom.¹⁵ At common law, upon the breach of the condition the estate vested in the mortgagee becomes indefeasible, but the hardship of this rule early won the leniency of the court of equity, and the mortgagor was allowed to redeem within a reasonable time, by paying the amount actually due; the debt being regarded as the principal thing. Eventually this estate came to be regarded as a distinct estate vested in the mortgagor, which is still jealously protected. In most, if not all, of the states, proceedings to foreclose the equity of redemption of the mortgagor and those claiming under him, are regulated by statute, and these regulations are a part of the contract.¹⁶ The right of redemption from the lien of a mortgage before breach of condition, as

¹³ Anderson's L. Dict. 886; VI. Cent. Dict. & Cycl. 5019.

¹⁴ Anderson's L. Dict. 886; VI. Cent. Dict. & Cycl. 5019.

¹⁵ See *post*, chap. XLII., "Terms, Conditions, Modes and Effects."

¹⁶ See *Smith v. People's Bank*, 24 Me. 185, 193; *Abraham v. Chenoweth*, 9 Oreg. 348, 351; *Walker v. King*, 44 Vt. 601, 612; *Peugh v. Davis*, 96 U. S. 337, 24 L. ed. 775; *Clark v. Reyburn*, 75 U. S. (8 Wall.) 321, 19 L. ed. 354.

In *Clark v. Reyburn*, *supra*, Mr. Justice Swayne says: "In this country the proceeding in most of the states, and, perhaps, in all of

them, is regulated by statute. The remedy thus proscribed, when executed, enters into the convention of the parties in so far that any change by legislative authority which affects it substantially, to the injury of the mortgagee, is held to be a law 'impairing the obligation of contracts,' within the meaning or the provision of the constitution." Citing *Williamson v. Doe*, 7 Blackf. (Ind.) 13; *Bronson v. Kinzie*, 42 U. S. (1 How.) 311; 11 L. ed. 143. The same is also the case regarding the interests and rights of the mortgagor.

we shall see hereafter,¹⁷ is a legal right, and after a breach of condition, it is an equitable right.¹⁸ Used with strict propriety, the term "equity of redemption," is applicable to the equitable right only. The "equity of redemption" is that interest in the land which is held by the mortgagor, before foreclosure; while the "right of redemption" is not an interest in the land at all, but a mere personal privilege given by statute to the mortgagor after the land has been sold under the mortgage.¹⁹

§ 1026. **Origin of doctrine.**—The doctrine of the right of redemption was introduced into English jurisprudence from that great fountain-head of equitable doctrines,—the Roman or civil law. According to the doctrine of the common law,²⁰ a mortgage was an estate upon condition, which became absolute upon the failure of the mortgagor to perform the condition on the law day, that is, on the day stipulated.²¹ Under the equitable doctrine, failure to perform the condition upon the day stipulated, does not work a forfeiture of the property, but merely invests the mortgagee with authority to sell the property and from the proceeds arising from such sale to repay the debt or obligation, together with the costs of sale. In other words, under the equitable doctrine, a mortgage is merely a security for the payment of the debt. This principle

¹⁷ See *post*, §§ 1027, 1031, 1032.

¹⁸ See *post*, §§ 1032, 1033.

For history of doctrine of equity of redemption and the development of the doctrine. See 3 Kerr on Real Prop. § 2086, *et seq.*

¹⁹ *Lewis v. McBride*, 57 So. 705 (Ala.).

²⁰ At common law a mortgagee took legal title, and foreclosure was to terminate the mortgagor's right to redeem. Under the statute, the mortgagee has only a lien and foreclosure enforces the lien. The right of redemption now is to satisfy and

remove the lien. The rights to foreclose and to redeem afford mutuality. *Connor v. Connor*, 59 Fla. 467, 52 So. 727.

²¹ At common law the mortgage was regarded as a conveyance of a conditional estate, and upon breach of its conditions, the estate became absolute, but to relieve the hardship of this rule, courts of equity gave to the mortgagor a right to redeem, upon payment of the debt secured, within a reasonable time. See *Goodenow v. Ewer*, 16 Cal. 461, 76 Am. Dec. 540.

was adopted by the courts of equity²² to prevent the hardships and the injustice resulting at common law from a failure to comply with the conditions of the mortgage.

§ 1027. Nature and extent of right.—Right to redeem from a mortgage is reciprocal with the right of foreclosure,²³

—In California a mortgage, whatever its terms, is not regarded as a conveyance of any interest vesting in the mortgagee enabling him to recover possession without a foreclosure and sale. See *Jackson v. Lodge*, 36 Cal. 39; *Dutton v. Worschauer*, 21 Cal. 621, 82 Am. Dec. 765; *Lord v. Morris*, 18 Cal. 488; *Boggs v. Fowler*, 16 Cal. 559, 76 Am. Dec. 561.

²² See *Posten v. Miller*, 60 Wis. 494, 19 N. W. 540.

²³ *Connor v. Connor*, 52 So. 727 (Fla.) See *post*, § 1028. Also *Boggs v. Fowler*, 16 Cal. 559, 76 Am. Dec. 561; *Goodenow v. Ewer*, 16 Cal. 461, 76 Am. Dec. 540; *Johnson v. Sherman*, 15 Cal. 287, 76 Am. Dec. 481; *Clark v. Baker*, 14 Cal. 612, 76 Am. Dec. 449; *Koch v. Briggs*, 14 Cal. 256, 73 Am. Dec. 651; *Haffley v. Maier*, 13 Cal. 28; *Nagle v. Macy*, 9 Cal. 426; *McMillan v. Richards*, 9 Cal. 365, 70 Am. Dec. 655; *Carpenter v. Bowen*, 42 Miss. 28; *Harper's Appeal*, 64 Pa. St. 315.

In California, in the case of *Goodenow v. Ewer*, *supra*, the court say: "In this state, a mortgage is not regarded as a conveyance vesting in the mortgagee any estate in the land, either before or after condition broken. It is regarded, as in fact it is intended by the parties, as a mere security, operating upon the property as a

lien or incumbrance only. Here the equitable doctrine is carried to its legitimate result. Between the view thus taken and the common-law doctrine—that the mortgage is a conveyance of a conditional estate—there is no consistent intermediate ground. In those states where the mortgage is sometimes treated as a conveyance, and at other times as a mere security, there is no uniformity of decision. The cases there exhibit a fluctuation of opinion between equitable and common law views on the subject, and a hesitation by the courts to carry either views to its logical consequences. In *McMillan v. Richards*, 9 Cal. 365, 70 Am. Dec. 655, we had occasion to consider the subject at great length, and to observe upon the diversity existing in the adjudged cases. We there asserted what had previously been held in repeated instances, the equitable doctrine as the true doctrine respecting mortgages, and have ever since applied it under all circumstances. See *Nagle v. Macy*, 9 Cal. 426; *Haffley v. Maier*, 13 Cal. 13; *Koch v. Briggs*, 14 Cal. 256, 73 Am. Dec. 651; *Clark v. Baker*, 14 Cal. 612, 76 Am. Dec. 449; and *Johnson v. Sherman*, 15 Cal. 287, 76 Am. Dec. 481. When, therefore, a mortgage is here executed, the estate remains in the mortgagor, and a mere lien or incumbrance upon

it is a creature of the law,²⁴ and an incident of every mortgage.²⁵ The statutory right of redemption applies to sales under decrees in mortgage foreclosures as well as to sales under ordinary judgments at law.²⁶ And one entitled to redeem land from the holders of the legal title, on the payment of a certain balance due, has the same right of redemption from the mortgagee of the legal title, on the payment of that sum.²⁷ But where a party is entitled to redeem from the foreclosure of a prior mortgage he cannot gain the title held by the purchaser in foreclosure proceedings except by redemption.²⁸

It is said in the case of *Whitney v. Higgins*,²⁹ that parties to a foreclosure suit in which judgment is rendered under which a sale is made, are restricted to the statutory period

the premises is created. The proceeding for a foreclosure of the equity of redemption, as those terms are understood where the common-law view of mortgages is maintained, is unknown to our system, so far, at least, as the owner of the estate is concerned. The mortgagee can here, in no case, become the owner of the mortgaged premises, except by purchase, upon a sale under judicial decree consummated by conveyance. Proceedings in the nature of a suit to foreclose an equity of redemption, held by a subsequent incumbrancer, may undoubtedly be maintained by a purchaser under the decree, where such incumbrancer was not made a party to the original suit to enforce the mortgage. Such incumbrancer may be called upon to assert his right by virtue of his lien, and his equity of redemption, extending to the period provided by the statute of limitations, be thus reduced to the statutory period of six months. But the owner of the mortgaged premises, where no

power of sale is embraced in the mortgage, cannot, under any circumstances, be cut off from his estate, except by sale in pursuance of the decree of the court. See Practice Act, § 260; *Whitney v. Higgins*, 10 Cal. 547, 70 Am. Dec. 748; *Montgomery v. Tutt*, 11 Cal. 190. To give validity to such decree, the owner must be before the court when it is rendered. No rights which he possesses can otherwise be affected, and any direction for their sale would be unavailing for any purpose."

²⁴ See *post*, § 1034.

²⁵ See *post*, § 1029.

The right to redeem lands from a sale under foreclosure, under special circumstances, determined. *Goodrich v. Friedersdorff*, 27 Ind. 308.

²⁶ *McMillan v. Richards*, 9 Cal. 96, 70 Am. Dec. 655.

²⁷ *Brooke v. Bordner*, 125 Pa. St. 470, 17 Atl. 467, 24 W. N. C. 53.

²⁸ *Simmons v. Taylor*, 38 Fed. 682.

²⁹ 10 Cal. 547, 70 Am. Dec. 748.

in which to redeem. The rights, after decree, depend entirely upon the statute, and they have no equity. Such is also the case with parties acquiring interests pending a suit to enforce previously existing claims; they take in subordination to any decree which may be rendered, as do those whose interests are acquired after judgment docketed or sale made.

In all those cases where a mortgage debt is not absolutely due on default of the payment of interest, but only at the election of the mortgagee duly declared, in the absence of his declaration the right to redeem and prevent the sale, on payment of the interest in arrears, is not destroyed by a stipulation in the mortgage authorizing a sale of the property as an entirety, and the payment of the whole debt, in case of a sale for any default, even though the whole debt should not be due.³⁰

§ 1028. Reciprocal with right to foreclose.—The right of a mortgagor, or those claiming under him, to maintain an action to redeem property from the lien of a mortgage, is reciprocal and commensurate with the right to foreclose. When one is barred the other is barred.³¹

This is a general rule recognized by all the text books and decisions. Hilliard, in his work on the law of mortgages, says: "In general, the respective rights of mortgagee and mortgagor with regard to a foreclosure on the one hand, and a redemption on the other, are treated as mutual; that is, the existence of the former is held to involve that of the latter, and *vice versa*; and the fact that the one cannot legally be enforced under the circumstances, is regarded as sufficient to preclude the claim for the other."³²

³⁰ *Chicago, D. & V. R. R. Co. v. Fosdick*, 106 U. S. 47, 27 L. ed. 47, 1 Sup. Ct. Rep. 10.

³¹ *Cunningham v. Hawkins*, 24 Cal. 403, 85 Am. Dec. 73; *Koch v. Briggs*, 14 Cal. 256, 73 Am. Dec. 651; *Caufman v. Sayre*, 2 B. Mon.

(Ky.) 206; *King v. Meighen*, 20 Minn. 264. See *Henderson v. Crammar*, 66 Cal. 336; *Wright v. Ross*, 36 Cal. 434; *Arrington v. Liscom*, 34 Cal. 372, 94 Am. Dec. 722; *Green v. Turner*, 38 Iowa, 116.

³² 2 Hill. on Mortg. 1.

§ 1029. An incident of every mortgage.—The right of redemption is a legal incident of every mortgage,³³ and is guarded by the courts with jealous care.³⁴ The rule that an instrument that is once a mortgage is always a mortgage is inflexible;³⁵ so that if a contract is in reality merely a security, no matter what may be the form of the instrument in which it is expressed, the right of redemption attaches³⁶ and cannot be controlled by stipulations or agreements³⁷ designed to abridge or bar the right.³⁸ All the cases show that an absolute sale and defeasance in the same instrument must be a mortgage and nothing but a mortgage.³⁹ The learned

³³ *Skeels v. Blanchard*, 81 Atl. 913 (Vt.)

³⁴ *Lennell v. Lyford*, 72 Me. 280. See also *H. B. Clafin Co. v. Middlesex Banking Co.* 113 Fed. 958.

³⁵ *Simon v. Schmidt*, 41 Hun 318, 2 N. Y. S. R. 388; *Newcomb v. Banham*, 1 Vern. 8. See *Jones v. Gillett*, 142 Iowa, 506, 118 N. W. 314.

³⁶ See *Clark as adm'r, etc. v. Seagraves*, 186 Mass. 430, 71 N. E. 813; *Bobb v. Wolff*, 148 Mo. 335, 49 S. W. 996. See also *Over v. Carolus*, 171 Ill. 552, 49 N. E. 514.

³⁷ See *post*, § 1038.

³⁸ *Lounsbury v. Norton*, 59 Conn. 170; *Tennery v. Nicholson*, 87 Ill. 464; *Bailey v. Bailey*, 71 Mass. (5 Gray) 510; *Kelleran v. Brown*, 4 Mass. 443; *Youle v. Richards*, 1 N. J. Eq. (1 Saxt.) 534, 23 Am. Dec. 722; *Clark v. Henry*, 2 Cow. (N. Y.) 32, affirming sub nom *Henry v. Davis*, 7 John. Ch. (N. Y.) 40; *Dunham v. Dey*, 15 John. (N. Y.) 555, 8 Am. Dec. 282; *James v. Johnson*, 6 John. Ch. (N. Y.) 417; *Dey v. Dunham*, 2 John. Ch. (N. Y.) 189; *Holridge v. Gillespie*, 2

John. Ch. (N. Y.) 30; *Gillis v. Martin*, 2 Dev. (N. C.) Eq. 470, 25 Am. Dec. 792; *Stoever v. Stoever*, 9 Serg. & R. (Pa.) 434; *Kerr v. Gilmore*, 6 Watts (Pa.) 408; *Stephens v. Sherrod*, 6 Tex. 294, 55 Am. Dec. 776; *Stamper v. Johnson*, 3 Tex. 1; *Peugh v. Davis*, 96 U. S. 332, 24 L. ed. 775; *Watts v. Keller*, 56 Fed. 1; *Fontol*, Eq. (4th Am. ed.) 494, note, 2 Story Eq. Jan. (13th ed.) § 1018. See *Harrington v. Foley*, 108 Iowa, 287, 79 N. W. 64.

³⁹ *Kerr v. Gilmore*, 6 Watts (Pa.) 408; *Stephens v. Sherrod*, 6 Tex. 294, 55 Am. Dec. 776; *Bobb v. Wolff*, 148 Mo. 335, 49 S. W. 996; *Duell v. Leslie*, 207 Mo. 658, 106 S. W. 489. See *Gibbs v. Haughwout*, 207 Mo. 384, 105 S. W. 1067. See also *Brown v. Follette*, 155 Ind. 316, 58 N. E. 197.

One who desires to have a deed absolute on its face decreed to be a mortgage, must offer to redeem. See also *Gerhardt v. Tucker*, 187 Mo. 46, 85 S. W. 552; *Mack v. Hill*, 28 Mont. 99, 72 Pac. 307.

An absolute deed, with a defeas-

judge who delivered the opinion of the court in the case of

ance, is a mortgage: *Reading v. Weston*, 7 Conn. 143, 18 Am. Dec. 89; *Washburn v. Merrills*, 1 Dey (Conn.) 139, 2 Am. Dec. 59; *Belton v. Avery*, 2 Root (Conn.) 279, 1 Am. Dec. 70; *Clark v. Lyon*, 46 Ga. 202; *Klock v. Water*, 70 Ill. 416; *Ewart v. Walling*, 42 Ill. 453; *Preschbaker v. Feaman*, 32 Ill. 475; *Tillson v. Boulton*, 23 Ill. 648; *Crassen v. Swoveland*, 22 Ind. 427; *Watkins v. Gregory*, 6 Blackf. (Ind.) 113; *Harbison v. Lemon*, 3 Blackf. (Ind.) 51, 23 Am. Dec. 376; *Montgomery v. Chadwick*, 7 Iowa 114; *Edrington v. Harper*, 3 J. J. Marsh. (Ky.) 353, 20 Am. Dec. 145; *McLaughlin v. Shepherd*, 32 Me. 143, 52 Am. Dec. 646; *Bennick v. Whipple*, 12 Me. 346, 28 Am. Dec. 186; *Chase's Case*, 1 Bland. Ch. (Md.) 206, 17 Am. Dec. 277; *Campbell v. Dearborn*, 109 Mass. 130, 12 Am. Rep. 671; *Woodward v. Pickett*, 74 Mass. (8 Gray.) 617; *Bayley v. Bailey*, 71 Mass. (5 Gray.) 505; *Erschine v. Townsend*, 2 Mass. 493, 3 Am. Dec. 71; *Archambau v. Green*, 21 Minn. 520; *Weide v. Gehl*, 21 Minn. 449; *Hill v. Edwards*, 11 Minn. 22; *Enos v. Sutherland*, 11 Mich. 538; *O'Neill v. Capelle*, 62 Mo. 202; *Sharkey v. Sharkey*, 47 Mo. 543; *Copeland v. Yoakum*, 38 Mo. 349; *Tibeau v. Tibeau*, 22 Mo. 77; *Wilson v. Drumrite*, 21 Mo. 325; *Youle v. Richards*, 1 N. J. Eq. (1 Saxt.) 534, 23 Am. Dec. 722; *Clark v. Henry*, 2 Cow. (N. Y.) 324, affirming sub nom *Henry v. Davis*, 7 John. Ch. (N. Y.) 40; *Dunham v. Dey*, 15 John. (N. Y.) 554, 8 Am. Dec. 282; *Dey v. Dunham*, 5 John. Ch. (N. Y.) 189; *Glover v. Payn*, 19 Wend. (N. Y.) 518; *Brown v.*

Dean, 3 Wend. (N. Y.) 208; *Lane v. Shears*, 1 Wend. (N. Y.) 433; *Robinson v. Willoughby*, 65 N. C. 520; *Mason v. Hearn*, 1 Busb. (N. C.) Eq. 88; *King v. Kinsey*, 1 Ired. (N. C.) Eq. 187, 36 Am. Dec. 40; *Gillis v. Martin*, 2 Dev. (N. C.) Eq. 470, 25 Am. Dec. 729; *Wilcox v. Morris*, 1 Murph. (N. C.) L. 116, 3 Am. Dec. 678; *Marshall v. Stewart*, 17 Ohio, 356; *Perkins v. Dibble*, 10 Ohio, 433, 36 Am. Dec. 97; *Harper's Appeal*, 64 Pa. St. 319; *Houser v. Lamont*, 55 Pa. St. 311, 316, 93 Am. Dec. 755; *Guthrie v. Kahle*, 46 Pa. St. 331; *Rutenbaugh v. Ludwick*, 31 Pa. St. 138; *Friedley v. Hamilton*, 17 Serg. & R. (Pa.) 70, 17 Am. Dec. 638; *Johnston v. Gray*, 16 Serg. & R. (Pa.) 361, 16 Am. Dec. 577; *Kelley v. Thompson*, 7 Watts (Pa.) 405; *Jaques v. Weeks*, 7 Watts (Pa.) 268; *Kerr v. Gilmore*, 6 Watts (Pa.) 405; *Colwell v. Woods*, 3 Watts (Pa.) 188, 27 Am. Dec. 345; *Manufacturers & Mechanics Bank v. Bank of Pennsylvania*, 7 Watts & S. (Pa.) 334, 42 Am. Dec. 240; *Hickman v. Cantrell*, 9 Yerg. (Tenn.) 172, 30 Am. Dec. 396; *Bennet v. Holt*, 2 Yerg. (Tenn.) 6, 24 Am. Dec. 455; *Baxter v. Dear*, 24 Tex. 17, 76 Am. Dec. 89; *Dabney v. Green*, 4 Hen. & M. (Va.) 101, 4 Am. Dec. 503; *Ross v. Norvell*, 1 Wash. (Va.) 14, 1 Am. Dec. 422; *Hyndman v. Hyndman*, 19 Vt. 9, 46 Am. Dec. 171; *Klinck v. Price*, 4 W. Va. 4, 6 Am. Rep. 268; *Brinkman v. Jones*, 44 Wis. 498; *Plato v. Roe*, 14 Wis. 453; *Knowlton v. Walker*, 13 Wis. 264; *Second Wara Bank v. Upmann*, 12 Wis. 499; *Dow v. Chamberlin*, 5 McL. C. C. 281.

Equity looks to the substantial

Kerr v. Gilmore⁴⁰ says: "Originally it would seem that what are now called mortgages, whether contained in one instrument or divided into an absolute deed and a defeasance on a separate paper, were considered at common law as sales on condition; and if the condition was not performed at the day, the estate became absolute, and could not be recovered; payment or tender, afterwards, were equally unavailing; and perhaps we may suppose this was the intention of one party, and the terms submitted to, by the other, under the infatuation which seems at all times to have cheered the heart of the debtor with the hope that he would soon be able to pay. It is unnecessary to inquire at what time and by what gradations courts of chancery took cognizance of, and relieved the debtor from, contracts which were often ruinously hard. The courts of law at length took notice that mortgages were only securities for money. 'The case of mortgages,' says Chancellor Kent,⁴¹ 'is one of the most splendid instances in the history of our jurisprudence, of the triumph of equitable principle over technical rules, and the homage which those principles have received by their adoption in courts of law.'"

object of the conveyance, and will consider an absolute deed as a mortgage, whenever it is shown to have been intended as a security. Fonbl. Eq. (4th Am. ed.) 494, note. See *Kelleran v. Brown*, 4 Mass. 443; *James v. Johnson*, 6 Johns. Ch. (N. Y.) 417; *Henry v. Davis*, 7 John. Ch. (N. Y.) 40; *Stover v. Stover*, 9 Serg. & R. (Pa.) 434; *Hughes v. Edwards*, 22 U. S. (9 Wheat.) 489, 6 L. ed. 142. See also *Fridley v. Somerville*, 60 W. Va. 272, 54 S. E. 502.

"As to what constitutes a mortgage," says Story (2 Story Eq. Jur. (13th ed.) § 1018), "there is no difficulty whatever in courts of equity, although there may be technical embarrassment in courts of

law. The particular form or words of the conveyance are unimportant; and it may be laid down as a general rule, subject to few exceptions, that wherever a conveyance, assignment, or other instrument, transferring an estate, is originally intended, between the parties, as a security for money, or for any other incumbrance, whether this intention appear from the same instrument or from any other, it is always considered in equity as a mortgage; and consequently is redeemable upon the performance of the conditions or stipulations thereof."

⁴⁰ 6 Watts (Pa.) 408.

⁴¹ 4 Kent Com. (13th ed.) 158

Hence, as long as the instrument is one of security, the borrower has the right to redeem, and a subsequent release of that right will be closely scrutinized to guard the debtor from oppression. It must be for a new and adequate consideration or it will not be upheld.⁴²

The supreme court of Oregon, in the case of *Wilson v. Tarter*,⁴³ say that an owner of one of several parcels of land sold under mortgage foreclosure without making him a party is not entitled to redeem the whole of the mortgaged premises against the wishes of the mortgagee, who has purchased on the sale; but the latter may elect whether to suffer such redemption or convey such parcel alone. And in some of the states there is no redemption, as a matter of right, from a sale of land by a county auditor under a school fund mortgage. In such a case the mortgagor seeking to recover the land so sold, has the burden of proving that the auditor, in making such sale, did not comply with the statutory requirements.⁴⁴

§ 1030. **Same—Exceptions to the rule.**—There are exceptions to the general rule as laid down in the preceding section. Thus it is said in *Parker v. Dacres*,⁴⁵ that in the state of Washington, while it was yet a territory, there was no equity of redemption in a mortgagor, and his equities had to be fixed by the court in its decree in the foreclosure suit. Nor can the provisions of the statute relating to redemption after execution sales be deemed to extend to mortgages.

Another exception is thought to be in favor of railroad

⁴² *Linnell v. Lyford*, 72 Me. 280.

⁴³ 22 Oreg. 504, 30 Pac. 499.

⁴⁴ *Bonnell v. Ray*, 71 Ind. 141.

Sale by auditor under school-fund mortgage is not invalid because the affidavit of proof of publication of notice thereof is not signed by affiant; nor because, in

offering the mortgaged and in parcels, the auditor did not designate or locate each particular quantity offered according to 1 Ind. Rev. St. 1876, p. 801, § 96. *Bonnell v. Ray*, 71 Ind. 141.

⁴⁵ 2 Wash. Tr. 439.

mortgages. Thus, under the Illinois statute,⁴⁶ providing a right of redemption "where lands shall be sold under and by virtue of any decree of a court of equity for the sale of mortgaged lands," it is held that the land and franchise of a railroad might be sold as an entirety, without the right of redemption as it could not have been the purpose of the legislature to compel a separate sale by which the value of each would be lost.⁴⁷

§ 1031. **A creature of the law.**—The right of redemption is not a right expressed in terms by the parties in the instrument; but is a creature of the law, pure and simple. We have already seen⁴⁸ that no matter what may be the ostensible nature of the transaction, or the form of the instrument, if it is intended merely as a security for the payment of money, the right of redemption attaches.⁴⁹ The sale and right of redemption under a power in a mortgage are governed by the law in force at the time the mortgage was made.⁵⁰

§ 1032. **Right an equitable one.**—The right to redeem an estate under mortgage after a breach of the condition has occurred is an equitable right which cannot be enforced in a suit at law.⁵¹ And where the mortgagee has entered for con-

⁴⁶ Ill. Rev. Stat. 1869, p. 397, § 27.

⁴⁷ *Peoria & S. R. Co. v. Thompson*, 103 Ill. 187; *Hammock v. Farmers' Loan & Trust Co.* 105 U. S. 77, 26 L. ed. 1111.

⁴⁸ See *ante*, § 1029.

⁴⁹ See *Plato v. Roe*, 14 Wis. 453; *Knowlton v. Walker*, 13 Wis. 264; *Orton v. Walker*, 3 Wis. 576; *Rogan v. Walker*, 1 Wis. 527; *Seton v. Slade*, 7 Ves. 265, 273, 6 Rev. 124; *Spurgeon v. Collier*, 1 Eden. 55, 60.

⁵⁰ *Smith v. Green*, 41 Fed. 455; *Haynes v. Treadway*, 133 Cal. 400, 65 Pac. 892; *Malone v. Roy*, 134

Cal. 344, 66 Pac. 313. See *Green v. Thornton*, 8 Cal. App. 160, 96 Pac. 382; *Bremen Mining & Milling Co. v. Bremen*, 13 N. M. 111, 79 Pac. 806; *Geddis v. Packwood*, 30 Wash. 270, 70 Pac. 481; *Pawtucket Mutual Fire Ins. Co. v. Landers*, 5 Kan. App. 623, 47 Pac. 621.

⁵¹ *Randall v. Bradley*, 65 Me. 43; *Cranston v. Crane*, 97 Mass. 459, 93 Am. Dec. 106; *Chapin v. Wright*, 41 N. J. Eq. 438, 5 Atl. 574; *Walker v. Warner*, 179 Ill. 16, 70 Am. St. Rep. 85, 53 N. E. 594; *Manhattan Life Ins. Co. v. Wright*, 126 Fed. 82, 61 C. C. A. 138. See *Parks v.*

dition broken, the only remedy for a mortgagor or his assignee, after payment of the debt, if the mortgagee refuses to relinquish possession of the mortgaged premises, is by bill in equity.⁵² After a mortgage debt is once discharged, there is no question but that the mortgagor or his assignee may compel the mortgagee or his assignee to surrender the legal title.⁵³

§ 1033. **A favorite of equity.**—The right to redeem is a favorite of equity, and will not be allowed to be taken away, except upon a strict compliance with the steps necessary to divest it.⁵⁴ Thus the mortgagee will not be permitted to extinguish the mortgagor's equity of redemption by a sale under execution at law, upon a judgment obtained upon the mortgage debt, although the possession has been removed by action at law; but the mortgagor will be entitled to file his bill to redeem.⁵⁵

Worthington, 39 Tex. Civ. App. 421, 87 S. W. 720.

⁵² *Brobst v. Brock*, 77 U. S. (10 Wall.) 519, 19 L. ed. 1002.

⁵³ *Smith v. Orton*, 62 U. S. (21 How.) 241, 16 L. ed. 104.

⁵⁴ *Chicago, D. & V. R. R. Co. v. Fosdick*, 106 U. S. 47, 27 L. ed. 47; *Bigler v. Waller*, 81 U. S. (14 Wall.) 297, 20 L. ed. 891; *Shillaber v. Robinson*, 97 U. S. 68, 24 L. ed. 967. See *Prondzinski v. Garbutt*, 8 N. D. 191, 77 N. W. 1012.

⁵⁵ *Powell v. Williams*, 14 Ala. 476, 48 Am. Dec. 105. In this case the question whether a mortgagee of real estate could cause the mortgaged premises to be levied upon and sold under a *fieri facias* to satisfy the debt intended to be secured was presented to the court for the first time. The Court say: Mortg. Vol. II.—90.

"It has been repeatedly held that the interest of a mortgagor in possession, at least before forfeiture, and perhaps afterwards, may be sold under an execution at law against his estate, at the suit of a third person; and that the purchaser would acquire a right to the possession as against the mortgagor, as well as the equity of redemption. See *McGregor & Darling v. Hall*, 3 Stew. & P. (Ala.) 397; *Perkins & Elliott v. Mayfield*, 5 Port. (Ala.) 182; *Cullum v. Emanuel*, 1 Ala. 23, 34 Am. Dec. 757; *Doe ex dem. Duval's heirs v. McLoskey*, 1 Ala. 708; *P. & M. Bank v. Willis*, 5 Ala. 770; *Stevver v. Herrington*, 7 Ala. 142, 41 Am. Dec. 86; *The Br. Bank at Mobile v. Hunt*, 8 Ala. 876; *Duval's Heirs v. The P. & M. Bank*, 10 Ala. 636."

In the case of *Clarkson v. Creely*,⁵⁶ where real estate was conveyed in trust to secure the payment of a debt, and the creditor stated that he should not sell the property without first giving actual notice of his intention so to do, and afterwards sold the property without giving such notice, the sale was set aside and the debtor had permission to redeem.

In California, since the enactment of the civil code,⁵⁷ a mortgagee who forecloses a deed, absolute in form, but in fact a mortgage, without at the same time foreclosing another deed given to secure the same indebtedness, but upon different property, is not entitled to a personal judgment for deficiency, the right of the mortgagor to redeem is not affected by the fact that no judgment for deficiency has been docketed.⁵⁸ The statute of a State⁵⁹ validating the record of conveyances previously made, cannot have any effect upon previous foreclosures, or deprive land owners of their right to redeem mortgaged premises.⁶⁰

§ 1034. Equitable and legal rights subject to.—The supreme court of Tennessee, in the case of *Beason v. Porterfield*,⁶¹ say that an equitable interest is subject to redemption as well as a legal interest; but the purchaser of land at a chancery sale acquires an equitable title, upon the implied condition that the purchase money shall be paid at the time stipulated, the payment of the consideration being essential to complete the equity; and if the land be sold, under the decree of the court, to enforce the payment of the purchase money, the land is not subject to redemption.

§ 1035. Assignment of mortgage on redemption.—The general rule is that the right to redeem a mortgage does not carry with it the right to an assignment of the mortgage,

⁵⁶ 40 Mo. 114.

⁵⁷ Cal. Civ. Code, § 726.

⁵⁸ *Hall v. Arnott*, 80 Cal. 348, 22 Pac. 200.

⁵⁹ As Minn. Act, Feb. 27, 1885.

⁶⁰ *Lowry v. Mayo*, 41 Minn. 388,

43 N. W. 78.

⁶¹ 3 Head (Tenn.) 363.

unless the redeeming party occupies the position of surety for the mortgage debt.⁶² A judgment creditor with a lien on the land, on coming in to redeem is entitled to an assignment of the mortgage where it is necessary to protect his interest.⁶³ And a junior mortgagee, on redeeming, may have an assignment of the mortgage, although he does not occupy the position of surety, in those cases where a satisfaction of the prior mortgage would not be as beneficial to the junior mortgagee as an assignment of it.⁶⁴

§ 1036. Waiver of right of redemption.—The right of the mortgagor and those claiming under him to redeem from the mortgage lien by payment of the mortgage debt being a creature of the law,⁶⁵ and an incident of every mortgage,⁶⁶ commensurate with the right to foreclose,⁶⁷ it cannot be abandoned or waived by any stipulation of the parties made at the time the instrument is executed,⁶⁸ where the real intention of the parties is to secure the payment of the debt and not to extinguish it,—even though embodied in the mortgage itself.⁶⁹ Thus the supreme court of the United States, in the

⁶² *Bigelow v. Cassedy*, 26 N. J. Eq. (11 C. E. Gr.) 557. See *Helt v. Ellis*, 31 Iowa, 86.

Thus in *Helt v. Ellis*, *supra*, where in a proceeding to redeem from a foreclosure sale of land, on account of alleged irregularities in the appointment of appraisers, an order was made that the plaintiff might redeem within a certain time, the court held that he was not entitled to have brought into court for his use whether he redeemed or not, a mortgage for purchase money held by the defendants from one to whom they had sold after their purchase at the foreclosure sale, and who was not shown to have had any notice of the alleged irregularities in the sale.

⁶³ See *Niagara Bank v. Rosevelt*, 9 Cow. (N. Y.) 409; *Dauchy v. Bennet*, 7 How. Pr. (N. Y.) 375.

⁶⁴ *Twombly v. Cassidy*, 82 N. Y. 155; *Pardee v. Van Auken*, 3 Barb. (N. Y.) 534.

⁶⁵ See *ante*, § 1031.

⁶⁶ See *ante*, § 1029.

⁶⁷ See *ante*, § 1028.

⁶⁸ See *post*, § 1038.

⁶⁹ *Baxter v. Willey*, 9 Vt. 276, 31 Am. Dec. 623; *Hiles v. Milwaukee Power & Light Co.* 85 Wis. 90, 55 N. W. 175; *Pough v. Davis*, 96 U. S. 332, 24 L. ed. 775.

In *Wisconsin*, in the case of *Hiles v. Milwaukee Power & Light Co.* 85 Wis. 90, 55 N. W. 175, the court say that the right given by the statute of that State to redeem

case of *Peuch v. Davis*,⁷⁰ say that it is an established doctrine that an equity of redemption is inseparably connected with a mortgage; that is to say, so long as the instrument is one of security the borrower has, in a court of equity, the right to redeem the property upon payment of the loan. This right cannot be waived or abandoned by any stipulation of the parties made at the time, even if embodied in the mortgage. This is a doctrine from which a court of equity never deviates. Its maintenance is deemed essential to the protection of the debtor, who under pressing circumstances will often submit to ruinous conditions, expecting or hoping to be able to repay the loan at its maturity and thus prevent the condition from being enforced and the property sacrificed. The body of American and English decisions is to the same effect.⁷¹ Not

mortgaged premises after judgment of foreclosure is in the nature of an exemption, and cannot be waived or shortened by the agreement of the mortgagor.

⁷⁰ 96 U. S. 337, 24 L. ed. 775.

⁷¹ *Fields v. Helms*, 82 Ala. 449; *Parmer v. Parmer*, 74 Ala. 285; *Pritchard v. Elton*, 38 Conn. 434; *Workman v. Greening*, 115 Ill. 477; *Bearss v. Ford*, 108 Ill. 16; *Willetts v. Burgess*, 34 Ill. 494; *Skemmer v. Miller*, 5 Litt. (Ky.) 84; *Linnell v. Lyford*, 72 Me. 280; *Baxter v. Child*, 39 Me. 112; *Waters v. Randall*, 47 Mass. (6 Met.) 479; *Nugent v. Riley*, 42 Mass. (1 Met.) 117, 35 Am. Dec. 355; *Wilson v. Drumrite*, 21 Mo. 325; *Clark v. Henry*, 2 Cow. (N. Y.) 324; *Cooper v. Whitney*, 3 Hill (N. Y.) 95; *Palmer v. Gumrey*, 7 Wend. (N. Y.) 248; *Hauser v. Lamont*, 55 Pa. 311, 93 Am. Dec. 755; *Wharf v. Howell*, 5 Binn. (Pa.) 499; *Heister v. Fortner*, 2 Binn. (Pa.) 43, 4 Am. Dec. 417; *Rankin v. Mortimore*, 7 Watts (Pa.) 372; *Jaques v.*

Weeks, 7 Watts (Pa.) 277; *Heister v. Maderia*, 7 Watts & S. (Pa.) 384; *Wheeland v. Swartz*, 1 Yeates (Pa.) 584; *Cherry v. Bowen*, 4 Sneed (Tenn.) 415; *Burrow v. Henson*, 2 Sneed (Tenn.) 658; *Bennett v. Holt*, 2 Yerg. (Tenn.) 6, 24 Am. Dec. 455; *Chapman v. Turner*, 1 Call (Va.) 281, 1 Am. Dec. 514; *Pennington v. Hanby*, 4 Munf. (Va.) 140; *King v. Newman*, 2 Munf. (Va.) 40; *Thompson v. Davenport*, 1 Wash. (Va.) 125; *Davis v. Demming*, 12 W. Va. 246; *Plato v. Roe*, 14 Wis. 453; *Knowlton v. Walker*, 13 Wis. 264; *Orton v. Knob*, 3 Wis. 576; *Jackson v. Lawrence*, 117 U. S. 679, 29 L. ed. 1024; *Peugh v. Davis*, 96 U. S. 337, 24 L. ed. 775; *Hughes v. Edwards*, 22 U. S. (9 Wheat.) 489, 6 L. ed. 142; *Casborne v. Scarfe*, 1 Atk. 603; *Goodman v. Grierane*, 2 Ball & B. 278; *Jason v. Eyres*, 2 Ch. Cas. 33; *East India Co. v. Atkyns*, 1 C. B. 349; *Floyer v. Lavington*, 1 Pr. Wms. 268; *Newcomb v. Bonham*, 2 Vent. 364; *Howard v.*

only is this doctrine in accord with the weight of American and English decisions, but it is thought that no case can be found in which it has been determined that the mortgagee can by force of any agreement, made at the time of creating the mortgage, entitle himself at his own election, to hold the estate free from condition, and cutting off the right in equity of the mortgagor to redeem.⁷²

A court of equity will set aside any agreement by a mortgagor contemporaneous with the execution of the mortgages by which he waives, unduly fetters, or agrees not to exercise his equity of redemption in event of default of the payment of the debt; but a subsequent agreement to convey for a fair consideration, made in order to avoid the expense of foreclosure, and reserving to the mortgagor the same right to redeem as if the property was sold under foreclosure, and showing no fraud or undue advantage, will be sustained.⁷³ And the court of chancery of New Jersey, in the case of *Heald v. Jardin*,⁷⁴ say that a mere statement by counsel for the owner of the equity of redemption in mortgaged lands made at a casual meeting on the street, that he does not think the owner will exercise his right to redeem, does not amount to a waiver of such option. In Tennessee, the right of redemption does not extend to a sale made under a power in a mortgage, wherein the right of redemption is waived.⁷⁵

It is said by the supreme court of Alabama, in the case of *Commercial Real Estate and Building Loan Association v. Parker*,⁷⁶ that in those cases where the mortgagor sells his equity of redemption, or assigns his interest in the mortgaged premises to another before sale thereof, this will constitute an abandonment of the statutory right of redemption, even though his assignee cannot exercise the right.

Harris, 1 Vern. 191; *Seton v. Slade*, 7 Ves. 273, 6 Rev. 124.

⁷² See *Waters v. Randall*, 47 Mass. (6. Met.) 479.

⁷³ *Stoutz v. Rouse*, 84 Ala. 309, 4 So. 170.

⁷⁴ 21 Atl. 586, 1890.

⁷⁵ *Hamilton v. Fowler*, 99 Fed. 18, 40 C. C. A. 47.

⁷⁶ 84 Ala. 298, 4 So. 268.

§ 1037. **Surrender of right of redemption.**—The mortgagor may surrender his right in the equity of redemption, thus rendering the mortgage absolute,⁷⁷ but this equity of redemption being a right in real estate, it cannot be released or surrendered except by an instrument in writing,⁷⁸ or such facts must be shown as will estop him from asserting any interest in the premises,⁷⁹ a mere parol agreement being insufficient under the statute of frauds to convert a mortgage into an absolute deed.⁸⁰ But a release or surrender, to be valid, must be founded upon an adequate consideration.⁸¹ Any marked undervaluation of the property in the price paid will vitiate the proceedings.⁸² Thus the supreme court of the United States, in the case of *Russell v. Southard*,⁸³ say that the surrender of the right to redeem, by a mortgagor in possession, will be closely scrutinized by a court of equity; and in those cases where it is obtained by the mortgagee denying the right to redeem, for no consideration, or as a condition to the correction of a mistake which in equity he was bound to correct, the surrender will be set aside by the court.

§ 1038. **Stipulations or agreements barring.**—The equity of redemption is a right in the land which is inseparably annexed to the mortgage, and cannot be dis-annexed therefrom, even by the express stipulation of the parties.⁸⁴

⁷⁷ *Youle v. Richards*, 1 N. J. Eq. (1 Saxt.) 534, 23 Am. Dec. 722. See also *Luesenhop v. Einsfeld*, 93 App. Div. 68, 87 N. Y. Supp. 268.

⁷⁸ *Clark v. Condit*, 18 N. J. Eq. (3 C. E. Gr.) 358; *Peugh v. Davis*, 96 U. S. 332, 24 L. ed. 775; *Sebrce v. Thompson*, 31 Ky. Law Rep. 1146, 104 S. W. 781.

⁷⁹ *Peugh v. Davis*, 96 U. S. 332, 24 L. ed. 775. See *Schnitter v. Law*, 189 Fed. 893.

⁸⁰ *Clark v. Condit*, 18 N. J. Eq. (3 C. E. Green) 358.

⁸¹ *Brownlee v. Martin*, 21 S. C.

392; *Brick v. Brick*, 98 U. S. 514, 25 L. ed. 256; *Peugh v. Davis*, 96 U. S. 332, 24 L. ed. 775; *Morgan v. Shinn*, 82 U. S. (15 Wall.) 105, 21 L. ed. 49; *Scholl v. Hopper*, 134 Ky. 83, 119 S. W. 770; *Ferguson v. Boyd*, 79 N. E. 549 (Ind.)

⁸² *Peugh v. Davis*, 96 U. S. 332, 24 L. ed. 775.

⁸³ 53 U. S. (12 How.) 139, 13 L. ed. 927.

⁸⁴ *Grover v. Hawthorne*, 121 Pac. 808 (Or.); *Stephens v. Sherrod*, 6 Tex. 294, 55 Am. Dec. 776; *Lucketts v. Townsend*, 3 Tex. 119,

This is a right that is not subject to be controlled by the agreement of the parties,⁸⁵ even though contained in the mortgage itself,⁸⁶ for, as Lord Eldon said: "You shall not,

49 Am. Dec. 723. See 2 Story Eq. Jan. (13th ed.) § 1019. See *Falkner v. Cody*, 45 Misc. 64, 91 N. Y. Supp. 633. See also *Barlow v. Cooper*, 109 Ill. App. 375.

⁸⁵ *Fields v. Helms*, 82 Ala. 449, 3 So. 106; *Parmer v. Parmer*, 74 Ala. 285; *Lounsbury v. Norton*, 59 Conn. 170; *Bearss v. Ford*, 108 Ill. 16; *Tennery v. Nicholson*, 87 Ill. 464; *Willeys v. Burgess*, 34 Ill. 494; *Preschbaker v. Feaman*, 32 Ill. 475; *Wynkoop v. Cowing*, 21 Ill. 570; *Linnell v. Lyford*, 72 Me. 280; *Baxter v. Child*, 39 Me. 110; *Bailey v. Bailey*, 71 Mass. (5 Gray.) 510; *Youle v. Richards*, 1 N. J. Eq. (1 Saxt.) 534, 23 Am. Dec. 722; *Henry v. Davis*, 7 John. Ch. (N. Y.) 40, affirmed sub nom; *Clark v. Henry*, 2 Cow. (N. Y.) 324; *Holridge v. Gillespie*, 2 John. Ch. (N. Y.) 30; *Gillis v. Martin*, 2 Dev. (N. C.) Eq. 470, 25 Am. Dec. 729; *Cherry v. Bowen*, 4 Sneed (Tenn.) 415; *Peugh v. Davis*, 96 U. S. 332, 24 L. ed. 775; *Fry v. Porter*, 1 Chan. Cas. 141; *East India Co. v. Atkins*, Comy. 347, 349; *James v. Oades*, 2 Vern. 402; *Seton v. Slade*, 7 Ves. 273, 6 Rev. 124; *Johnson v. Prosperity Loan & Building Ass'c.* 94 Ill. App. 260. See *Conover v. Palmer*, 60 Misc. 241, 111 N. Y. Supp. 1074; *Shank v. Groff*, 43 W. Va. 337, 27 S. E. 340; *Griffen v. Cooper*, 73 N. J. Eq. 465, 68 Atl. 1095.

In the case of *Tennery v. Nicholson*, 87 Ill. 464, a debtor conveyed land by a deed absolute on its face,

taking a written agreement for a reconveyance on payment of the debt. Afterwards he gave a new note for \$1,071, taking a similar agreement, wherein time was made of the essence of the contract, and which provided that in case of failure to pay on the day named, "the intervention of equity is forever barred." Failing to pay, and believing his right of redemption gone, he promised to pay \$2,000 at ten per cent., and took another agreement for a deed. The court held the equity of redemption could only be cut off by a foreclosure, and that the last promise was, for want of consideration, not binding on him.

The court of chancery of New Jersey, in the case of *Youle v. Richards*, 1 N. J. Eq. (1 Saxt.) 534, 23 Am. Dec. 722, say: "If the conveyance is a mortgage in the beginning the right of redemption is an independent incident, and cannot be restrained or clogged by agreements." *Henry v. Davis*, 7 John Ch. (N. Y.) 40, 42. Such an agreement, says Fontlanque, would be contrary to natural justice in the creation of it, and prove a general mischief, because every lender would, by this method, make himself chancellor in his own case, and prevent the judgment of the court; 2 Fonbl. 259. See, also, *Fry v. Porter*, 1 Ch. Cas. 141; *James v. Oades*, 2 Vern. 402; *Seton v. Slade*, 7 Ves. 273, 6 Rev. 124; and 1 Pow. on Mort. 116, *et seq.*

⁸⁶ *Clark v. Henry*, 2 Cow. (N.

by special terms, alter what this court say are, the special terms of that contract.”⁸⁷ Thus the courts have held void agreements and stipulations tending to alter the original nature of the mortgage, in any subsequent event, so as to cut off the equity of redemption,⁸⁸ as well as agreements or stipulations at the time of the contract, that the purchaser should, in default of the debtor, become the absolute owner, if the subject was once redeemable.⁸⁹ In an old case⁹⁰ it is said that if a man makes a mortgage and covenants not to bring a bill to redeem, and even goes so far, as is *Stisted's Case*, as to take an oath that he will not redeem, yet he shall redeem.

The doctrine of common law, as approved and modified by the principles of the civil law, was that an equity of redemption could not be cut off except by a foreclosure, and that is the general rule in this country to-day, in the absence of any statute controlling. Thus, it has recently been held by the United States circuit court of appeals, sitting in the eighth circuit, that an election by the grantee in an absolute deed constituting a mortgage in equity, to avail himself of an

Y.) 324, affirming sub nom *Henry v. Davis*, 7 John Ch. (N. Y.) 405; *Grover v. Howthorne*, 121 Pac. 808 (Or.); *Boyer v. Paine*, 60 Wash. 56, 110 Pac. 682 (Wash.)

A subsequent agreement by which the mortgagor is to forfeit the land absolutely if the debt is not paid on the day stated, may be void as well. *Tennery v. Nicholson*, 87 Ill. 464; *Batty v. Snook*, 5 Mich. 231; *Holden Land & Live Stock Co. v. Interstate Trading Co.* 123 Pac. 733 (Kan.) See also *Wells v. Geyer*, 12 N. D. 316, 96 N. W. 289.

Mortgagor's equity of redemption cannot be extinguished by adversary proceedings other than judicial process of foreclosure, even in the presence of a stipulation of the conveyance of the legal title and

right of possession to the mortgagee. *Kirkendall v. Weatherley*, 77 Neb. 421, 9 L.R.A. (N.S.) 515, 109 N. W. 757.

⁸⁷ *Seton v. Slade*, 7 Ves. 273, 6 Rev. 124. See *Toomes v. Conset*, 3 Ark. 261; *Floyer v. Livingston*, 1 Pr. Wm. 268.

⁸⁸ *Lounsbury v. Norton*, 59 Conn. 170, 20 Atl. 153; *Youle v. Richards*, 1 N. J. Eq. (1 Saxt.) 534, 23 Am. Dec. 722.

⁸⁹ *Henry v. Clark*, 7 John Ch. (N. Y.) 40, aff'd sub. nom. *Clark v. Henry*, 2 Cow. (N. Y.) 324; *Stone v. Barnds*, 1 Ohio St. 107; *Gillis v. Martin*, 2 Dev. (N. C.) Eq. 470, 25 Am. Dec. 729.

⁹⁰ *East India Co. v. Atkyns*, 1 Comy. 347, 349.

option therein to retain the property in satisfaction of the loan, will not operate to bar the equity of redemption, but such equity can be barred only by a proper foreclosure.⁹¹

It is said, in *Cottingham v. Springer*,⁹² the common law rule, that an equity of redemption can be cut off only by a foreclosure in equity, does not prevail in Illinois; and that by a sale under an execution, on a judgment for a debt secured by a mortgage, and by a sheriff's deed to the mortgagee, he acquires the equity of redemption, which, united with his estate under the mortgage, gives him the absolute title. And in *Cook v. McFarland*,⁹³ the court say that parties to an action of foreclosure may stipulate that sales upon a decree therein shall be absolute and without redemption; and a decree and sale based thereon is in effect an adjudication binding upon the parties as well as the subsequent incumbrances.

§ 1039. Right of an estate in lands.—The general rule is that the equity of redemption is a real and beneficial estate in lands, which may be sold and conveyed by the mortgagor in any of the ordinary modes of assurance, subject only to the lien of the mortgage.⁹⁴ On conveyance, the assignee takes the land subject to the mortgage and the covenants thereon, which may be enforced against the land in the same manner and to the same extent as if the assignment had not been made.⁹⁵

The equity of redemption being a right to real estate, it cannot be released or surrendered, except by an instrument in writing,⁹⁶ or such facts are shown as will estop the party from asserting an interest in the premises.⁹⁷ Yet the supreme

⁹¹ *Watts v. Kellar*, 56 Fed. 1.

⁹² 88 Ill. 90.

⁹³ 78 Iowa, 528, 43 N. W. 519.

⁹⁴ *McMillan v. Richards*, 9 Cal. 365, 70 Am. Dec. 655.

⁹⁵ *Schooley v. Romain*, 100 Ad. 87.

⁹⁶ *Clark v. Coudit*, 18 N. J. Eq. (3 C. E. Gr.) 358; *Peugh v. Davis*, 96 U. S. 332, 24 L. ed. 775.

⁹⁷ *Peugh v. Davis*, 96 U. S. 332, 24 L. ed. 775.

court of Ohio have held, in the case of *Shaw v. Wallbridge*,⁹⁸ that in those cases where a deed absolute on its face is claimed by the grantor to be a mortgage, it is competent to show that, although originally a mortgage, the equity of redemption has been released by parol.

§ 1040. **Same—Alabama doctrine.**—In some of the states the general rule, as laid down in the last section, does not prevail. Thus, it is held in Alabama that the right of redemption given by the code in that state⁹⁹ is distinct and different from the common law equity of redemption; and it is personal to the debtor, that it is not property, and therefore is not capable of passing to an assignee of the equity of redemption.¹

§ 1041. **Same—A rule of property.**—The general rule is that a state statute, with rules of practice of state courts framed for enforcement of it, declaring a right of redemption of mortgaged property on foreclosure, is a rule of property, and is obligatory on federal courts deciding on claims and interests in real property within the state.² It has been repeatedly held that the statutory right of redemption after a sale under a decree of foreclosure is a rule of property in the state where in force, and must be observed in the federal courts equally with those of the state.³ But while the local law giv-

⁹⁸ 33 Ohio St. 1.

⁹⁹ Ala. Code, 1886, § 1879, *et seq.*

¹ *Powers v. Andrews*, 84 Ala. 289, 4 So. 263; *Aiken v. Bridgeford*, 84 Ala. 295, 4 So. 266; *Commercial Real Estate & Bldg. Asso. v. Parker*, 84 Ala. 298, 4 So. 268.

The case of *Bailey v. Timberlake*, 74 Ala. 221, is overruled.

² *Berne v. Hartford Fire Ins. Co.* 96 U. S. 627, 24 L. ed. 858. See, also, authorities two foot notes following.

³ *Connecticut Mut. L. Ins. Co. v. Cushman*, 108 U. S. 51, 27 L. ed. 648; *Swift v. Smith*, 102 U. S. 442, 27 L. ed. 193; *Orvis v. Powell*, 98 U. S. 176, 25 L. ed. 238; *Brine v. Hartford Fire Ins. Co.* 96 U. S. 627, 24 L. ed. 858; *Metropolitan Nat. Bank of N. Y. v. Connecticut Mut. L. Ins. Co.* 24 L. ed. 1011. (Not in official edition.)

ing the right of redemption first to the mortgagor, then to judgment creditors, is a rule of property obligatory upon the federal court, the latter may prescribe the mode in which redemption from sales under its own decrees may be effective.⁴

§ 1042. Restriction of right to redeem—To particular person.—The right to have a mortgage lien discharged from the premises by payment of the debt and to redeem the same, being inseparably connected with every mortgage,⁵ any agreement or stipulation appearing as a restriction of the right of redemption to the mortgagor personally is inconsistent with the nature of a mortgage, and therefore void.⁶ As it has been said that whenever it clearly appears to have been the intention of the parties that the land conveyed shall be subject to redemption, the right of redemption cannot be limited in time or to a particular person or persons.⁷ This is upon the ground that if the conveyance is a mortgage in the beginning, the right of redemption is an independent incident and cannot be restrained or clogged by any agreements,⁸ because such a restriction would be contrary to natural justice and might work oppression to the mortgagor.⁹

It is thought, however, some restrictions upon the right of redemption are not open to the objection above pointed out, and are therefore binding upon the mortgagor and all those claiming under him. Thus in the case of *Bonham v. Newcomb*,¹⁰ the mortgagor limited the right of redemption to his own life for the purpose of benefiting, by way of set-

⁴ *Connecticut Mut. L. Ins. Co. v. Cushman*, 108 U. S. 51, 27 L. ed. 648.

⁵ See *ante*, § 1029.

⁶ *Johnson v. Gray*, 16 Serg. & R. (Pa.) 361, 16 Am. Dec. 577; *Spurgeon v. Collier*, 1 Eden, 551; *Howard v. Harris*, 1 Vern. 33; *Newcomb v. Bonham*, 1 Vern. 8.

⁷ *Youle v. Richards*, 1 N. J. Eq. (1 Saxt.) 534, 23 Am. Dec. 722.

⁸ *Youle v. Richards*, 1 N. J. Eq. (1 Saxt.) 534, 23 Am. Dec. 722; *Henry v. Davis*, 7 John. Ch. (N. Y.) 40, 42.

⁹ 2 Fonbl. 259. See *Fry v. Porter*, 1 Ch. Cas. 141; *James v. Oades*, 2 Vern. 402; *Seton v. Slade*, 7 Ves. 273, 6 Rev. 124.

¹⁰ 2 Vent. 364, 1 Vern. 8.

tlement, the mortgagee who was some near relative, reserving to himself the right to redeem at any time during his own life, and the arrangement was upheld. And in the case of *Stover v. Bounds*,¹¹ where the owner of a certificate of entry of land from the United States assigned such certificate as security for a debt, with a condition of defeasance, it was held that the right of the original assignor to redeem was not affected by a provision in the condition of defeasance limiting his time to redeem to a fixed period after the transaction, such limitation not affecting the vested right of redemption.

§ 1043. **Same—To particular time.**—The restricting of the time of redemption to a period other than that named in the statute will not, as a general rule, bar the right to redeem.¹² Thus it is said that the restriction of the right of redemption to one year in an absolute deed, with an agreement that it shall be void if a certain debt is not paid within a year, is null.¹³ But the Supreme Court of Wisconsin, in the case of *Hiles v. Milwaukee Power and Light Company*¹⁴ say that if a stipulation by an attorney acting under a warrant of attorney in a mortgage, shortening the time for redemption given by the Wisconsin statute after judgment of foreclosure to ten days, is a valid consent on the part of the

¹¹ 1 Ohio St. 107.

¹² *Stover v. Bounds*, 1 Ohio St. 107.

¹³ *Youle v. Richards*, 1 N. J. Eq. (1 Saxt.) 534, 22 Am. Dec. 722; *Winton's Appeal*, 87 Pa. St. 17.

In *Winton's appeal*, *supra*, a decree rendered in Pennsylvania in 1875, from which an appeal was taken in 1878, an amendment was made five days afterwards, as follows: "And upon the plaintiff's failure to make said payment for a period of thirty days after the filing

of this order, and notice of the same to him, that he, the said plaintiff, be for ever barred from all claim to and equity of redemption in the said 'Vosburg third.'" The court held, that this action was erroneous, as it was an attempt to bar a mortgagor's equity of redemption, which in this State can only be extinguished by his own agreement, by some act done by himself that estops him, or by a judicial sale.

¹⁴ 85 Wis. 90, 55 N. W. 175.

mortgagor to a sale at that time, such consent being sufficient to warrant a sale under the statutes of that state¹⁵ postponing sales of mortgaged premises of one year after judgment of foreclosure, both providing that the parties may, by stipulation in writing filed with the clerk, consent to an earlier sale, where all the parties to the action—especially subsequent mortgagees or incumbrancers—do not file such a consent.

§ 1044. Same.—By contract after breach of condition.—We have already seen,¹⁶ that the equitable right of redemption is a creature of the law, and not of contract,¹⁷ and that the parties are not permitted by special agreement to dis-annex from the mortgage, at the time of its execution, that which the law has declared shall be annexed to it.¹⁸ The reason of this rule is to prevent undue oppression of debtors by creditors. A like rule has been applied, for similar reasons, to the statutory right of redemption.¹⁹ This rule, however, does not apply to any fair and *bona fide* purchase of the right of redemption, which is entered into subsequently to the execution of the mortgage;²⁰ but courts of equity will scan such transactions with watchfulness, and will declare them void where procured by fraud, either actual or constructive, including any unconscionable advantage, or undue influence, or where made on a consideration which is grossly inadequate.²¹ This is on a parity of reasoning with the doctrine that where an owner of an equity of redemption agreeing with the mortgagees not to ask an adjournment to procure an order for a sale of the lands in parcels, in consideration of the mortgagee's bidding in the land and giving him the right to redeem within

¹⁵ Wis. Rev. Stat. 3162.

¹⁶ See *ante*, § 1031.

¹⁷ *Stoutz v. Rouse*, 84 Ala. 309,
4 So. 170.

¹⁸ See *ante*, §§ 1029, 1038.

¹⁹ *Stoutz v. Rouse*, 84 Ala. 309,
4 So. 170.

²⁰ *Stoutz v. Rouse*, 84 Ala. 309, 4
So. 170. See *Heald v. Jardine*, 21
Atl. 586.

²¹ *Stoutz v. Rouse*, 84 Ala. 309, 4
So. 170; *McKinstry v. Conly*, 12
Ala. 678; *Hitchcock v. Bank*, 7
Ala. 386, 443.

a stated time, stands in the same relation to the mortgagees after the sale, that he did before, and is entitled to redeem within the time limited.²²

There is much reason for the rule that, in the absence of fraud, undue influence or unconscionable advantage, the mortgagor may, at any time after the execution of the mortgage, by a new and separate contract, sell or release his equity of redemption to the mortgagee for a consideration that is not grossly inadequate.²³ In all such cases, however, a court of equity will examine strictly into the facts in order to ascertain that the transaction is a perfectly fair and independent proceeding, and entirely unconnected with the original contract of mortgage.²⁴

It is thought that the mortgagor may, for a valuable consideration, reduce his equity of redemption to a statutory right of redemption. The mortgagee certainly has a right to go into a court of chancery and foreclose his mortgage by due process of law. Where he does so, the result is to cut off the mortgagor's equity of redemption, and convert it into a statutory right of redemption; thus vesting the legal title of the estate absolutely in the mortgagee, subject to the right of the mortgagor, and certain other persons in privity with him, to redeem the premises on terms specified in the statute, and within the time fixed from the date of the foreclosure. This is true where the mortgagee himself buys at the fore-

²² *Heald v. Jardine*, 21 Atl. (N. J. Ch.) 586.

²³ *McKinstry v. Conly*, 12 Ala. 678; *Austin v. Bradley*, 2 Dey (Conn.) 466; *Wynkoop v. Cowing*, 21 Ill. 570; *Hicks v. Hicks*, 5 Gill & J. (Md.) 75; *Trull v. Skinner*, 34 Mass. (17 Pick.) 213; *Remsen v. Hay*, 2 Edw. Ch. (N. Y.) 535; *Russell v. Southard*, 53 U. S. (12 How.) 139, 13 L. ed. 927.

²⁴ *Locke v. Palmer*, 26 Ala. 312;

Mills v. Mills, 26 Conn. 213; *Brown v. Gafney*, 28 Ill. 149; *Baughner v. Merriman*, 32 Md. 185; *Holridge v. Gillespie*, 2 John. Ch. (N. Y.) 30; *Hyndman v. Hyndman*, 19 Vt. 9, 46 Am. Dec. 171; *Villa v. Rodrigues*, 79 U. S. (12 Wall.) 323; sub nom. *Alexander v. Rodriguez*, 20 L. ed. 406; *Russell v. Southard*, 53 U. S. (12 How.) 139, 154, 13 L. ed. 927, 933; *Webb v. Rorke*, 2 Sch. & L. 661, 673.

closure sale, or even under a power in the mortgage.²⁵ There is no apparent reason why the mortgagor and the mortgagee may not provide by a fair contract without resort to the courts for doing precisely what the law would do for them. Surely the law will not prohibit the parties from contracting for a valuable consideration, to do what it will compel by legal process. It is thought that unless the relation of the parties is used to acquire some undue influence, by which the mortgagee unfairly oppresses the mortgagor, or the sale is based on a grossly inadequate consideration, such a transaction will be sustained, for the reason that it is not an unfair sale of the equity of redemption, nor an unreasonable fettering of it within the meaning of the law. The effect of such a transaction is merely to convert it by contract into the statutory right of redemption, in order to save the expenses of foreclosure incident to a suit. It is the spirit of the law to favor the compromise of law suits, whether pending or threatened, upon the soundest principles of public policy. Upon these principles it is thought that such a transaction in relation to a defaulted mortgage is not only a prudent business arrangement, but one that will be looked upon favorably and upheld by courts of equity.²⁶

§ 1045. **Evasion of equitable rule.**—Any agreement or arrangement which is designed to enable the mortgagee to evade the equitable rule and wrest the property from the mortgagor is invalid and will not bar the right to redeem in the mortgagor, his heirs or assigns.²⁷ But it has been held that a stipulation in the mortgage limiting the time within which redemption is to be made does not affect the right of redemp-

²⁵ *Stoutz v. Rouse*, 84 Ala. 309, 4 So. 170; *Mewburn v. Bass*, 82 Ala. 622, 2 So. 320; *Comer v. Sheehan*, 74 Ala. 452; *Cooper v. Hornsby*, 71 Ala. 62, Ala. Code 1886, § 1879, *et seq.*

²⁶ *Stoutz v. Rouse*, 84 Ala. 309, 4 So. 170.

²⁷ *Spurgeon v. Collier*, 1 Eden. 55; *Newcomb v. Bonham*, 1 Freem. Ch. 67, 1 Vern. 8; *Howard v. Harris*, 1 Vern. 33.

tion itself, and is therefore valid;²⁸ also that stipulations limiting the time of redemption to the lifetime of the mortgagee as a means of benefiting the mortgagee, by way of settlement, will be upheld.²⁹

§ 1046. Payment of additional sum and taking title.—

An arrangement providing that in case of breach of the condition in the mortgage, the mortgagee shall pay a stipulated sum and take the title, is open to the objection that the equity of redemption is improperly cut off without due foreclosure, and for that reason will be set aside by a court³⁰ of equity.

§ 1047. Sale of equity of redemption to mortgagee.—

While equity will not recognize an agreement entered into at the time of executing the mortgage, whether contained in the same or a separate contemporaneous instrument,³¹ to waive or surrender the right in the equity of redemption,³² yet it will enforce a similar agreement subsequently made, where the transaction is based on a valuable consideration and fairly conducted,³³ and unmixed with any advantage taken by the mortgagee of the necessitous circumstances of the mortgagor; otherwise equity will hold the parties to the original relation

²⁸ *Storer v. Bounds*, 1 Ohio St. 107.

²⁹ *Bonham v. Newcomb*, 2 Vent. 364, 1 Vern. 8.

³⁰ See *Toomes v. Couset*, 3 Atk. 267; *East India Co. v. Atkins*, 1 Comp. 347, 349; *Vernon v. Bethell*, 2 Eden, 110; *Willett v. Winnell*, 1 Vern. 488.

³¹ In *Michigan*, in the case of *Batty v. Snook*, 5 Mich. 231, the court say: "To allow the equity of redemption to be cut off by a forfeiture of it in a separate contract would be a revival of the common law doctrine, using for the purpose

two instruments, instead of one, to effect the object."

³² See *ante*, §§ 1037, 1038.

³³ *Stoutz v. Rouse*, 84 Ala. 309, 4 So. 170; *McKinstry v. Conly*, 12 Ala. 678; *Green v. Butler*, 26 Cal. 595; *McMillan v. Richards*, 9 Cal. 365, 70 Am. Dec. 655; *Mills v. Mills*, 26 Conn. 213; *Wynkoop v. Cowing*, 21 Ill. 570; *Vernum v. Babcock*, 3 Iowa, 194; *Linell v. Lyford*, 72 Me. 280; *Baughner v. Merryman*, 32 Md. 185; *Daugherty v. McColgan*, 6 Gill. & J. (Md.) 275; *Hicks v. Hicks*, 5 Gill. & J. (Md.) 75; *Schickel v. Hopkins*, 2 Md. Ch. 89; *Falis v.*

of debtor and creditor.³⁴ But it is said that while the mortgagor may thus sell the equity of redemption to the mortgagee, he is entitled to every favorable consideration on account of the unequal relations of the parties, and that the sale, though not void, is viewed suspiciously.³⁵

The supreme court of the United States, in the case of *Peugh v. Davis*,³⁶ say: "A subsequent release of the equity of redemption may undoubtedly be made to the mortgagee. There is nothing in the policy of the law which forbids the transfer to him of the debtor's interest. The transaction will, however, be closely scrutinized so as to prevent any oppression of the debtor. Especially is this necessary when the creditor has shown himself ready and skillful to take advantage of the necessities of the borrower. Without citing the authori-

Conway Ins. Co. 89 Mass. (7 Allen) 46; *Trull v. Skinner*, 34 Mass. (17 Pick.) 213; *Harrison v. Trustees Phillips Academy*, 12 Mass. 456; *Batty v. Snook*, 5 Mich. 231; *McNees v. Swaney*, 50 Mo. 388; *Odell v. Montross*, 68 N. Y. 499, revg. 6 Hun (N. Y.) 155; *Remsen v. Hay*, 2 Ed. Ch. (N. Y.) 535; *Holridge v. Gillespie*, 2 John Ch. (N. Y.) 34; *Hyndman v. Hyndman*, 19 Vt. 9, 16 Am. Dec. 171; *Rogan v. Walker*, 1 Wis. 527; *Peugh v. Davis*, 96 U. S. 332, 24 L. ed. 775; *Villa v. Rodriguez*, 79 U. S. (12 Wall.) 323; sub nom. *Alexander v. Rodriguez*, 20 L. ed. 406; *Russel v. Southard*, 53 U. S. (12 How.) 139, 13 L. ed. 927; *Morris v. Nixon*, 42 U. S. (1 How.) 119, 126, 11 L. ed. 69, 72.

An absolute deed of land was given in *Trull v. Skinner*, 34 Mass. (17 Pick.) 213, accompanied by a simultaneous instrument not recorded, operating by way of defeasance. The parties afterwards, by mutual stipulations, agreed that

the defeasance should be surrendered and canceled without intent to vest the estate unconditionally in the grantee. The court held that this was a valid transaction, if conducted with fairness between all parties and rights of third persons had not intervened. See *McNees v. Swaney*, 50 Mo. 388.

³⁴ *Stoutz v. Rouse*, 84 Ala. 309, 4 So. 170; *McKinstry v. Conly*, 12 Ala. 678; *Mills v. Mills*, 26 Conn. 213; *Wynkoop v. Cowing*, 21 Ill. 570; *Linnell v. Lyford*, 72 Me. 280; *Baughner v. Merryman*, 32 Md. 185; *Dougherty v. McColgan*, 6 Gill & J. (Md.) 275; *Schickel v. Hopkins*, 2 Md. Ch. 89; *Remsen v. Hay*, 2 Edw. Ch. (N. Y.) 535; *Rogan v. Walker*, 1 Wis. 527; *Russell v. Southard*, 53 U. S. (12 How.) 139, 13 L. ed. 927; *Morris v. Nixon*, 42 U. S. (1 How.) 119, 126, 11 L. ed. 69, 72.

³⁵ *Hyndman v. Hyndman*, 19 Vt. 9, 46 Am. Dec. 171. See *Noble v. Graham*, 140 Ala. 413, 37 So. 230.

³⁶ 96 U. S. 332, 24 L. ed. 775.

ties, it may be stated as conclusions from them that a release to the mortgagee will not be inferred from equivocal circumstances and loose expressions. It must appear by a writing in terms a transfer of the mortgage or interest, or such facts must be shown as will operate to estop him from asserting any interest in the premises. The release must also be for an adequate consideration; that is to say, it must be for a consideration which would be deemed reasonable if the transaction were between other parties dealing in similar property in its vicinity. Any marked undervaluation of the property in the price paid will vitiate the proceeding."

§ 1048. **Same—Setting sale aside.**—A sale or release of the equity of redemption to the mortgagee by the mortgagor is looked upon with disfavor by courts of equity, and will be avoided for fraud of any kind, either actual or constructive, or for any advantage taken in the transaction by the mortgagee of the mortgagor's necessitous circumstances.³⁷ The mortgagor is entitled to every favorable consideration on account of the unequal relations of the parties, and the sale, though not void, is viewed suspiciously.³⁸ It must distinctly appear that the transaction is in all respects fair, and based upon an adequate consideration.³⁹

In the case of *Hicks v. Hicks*,⁴⁰ the relation of a mortgagor and mortgagee existed, and the latter purchased from the former his equity of redemption worth \$2,000 or \$2,500 for \$1,600. The court held it not such an inadequacy of price as to induce a court of equity to impeach the sale as unfair,

³⁷ See authorities cited in last four sections.

³⁸ *Hyndman v. Hyndman*, 19 Vt. 9, 46 Am. Dec. 171.

³⁹ *Patterson v. Yeaton*, 47 Me. 306; *Hicks v. Hicks*, 5 Gill & J. (Md.) 75; *Trull v. Skinner*, 34 Mass. (17 Pick.) 213; *Odell v. Montrass*, 68 N. Y. 499, rev'g 6

Hun (N. Y.) 155; *Remsen v. Hay*, 2 Edw. Ch. (N. Y.) 535; *Holridge v. Gillespie*, 2 John. Ch. (N. Y.) 30, 34; *Barnes v. Brown*, 71 N. C. 507; *Villa v. Rodriguez*, 79 U. S. (17 Wall.) 323; sub nom. *Alexander v. Rodriguez*, 20 L. ed. 406; *Ford v. Olden*, L. R. 3 Eq. Cas. 461.

⁴⁰ 5 Gill. & J. (Md.) 75.

particularly in the absence of corroborative proof of fraud, undue advantage, or the like.

But it is said by the supreme court of Wisconsin in the case of *Moeller v. Moore*,⁴¹ that a conveyance by a mortgagor to the mortgagee of a valuable equity of redemption, upon no consideration other than the assumption of a mortgage which is a first lien upon land worth several times its amount, will be set aside and the mortgagor allowed to redeem, even if the proof is insufficient to show that the conveyance was intended only as a mortgage.

§ 1049. **Same—Rule governing courts.**—The rule governing courts of equity when considering the right to redeem by the mortgagor, who has conveyed to the mortgagee the equity of redemption, is like that which governs a sale by the *cestui que trust* to his trustee.⁴² To give validity to a sale of the equity of redemption by the mortgagor to the mortgagee, the conduct of the mortgagee must be, in all things, fair and frank, and he must pay fair value. Any indirection or obliquity of conduct is fatal to his title. Every doubt will be resolved against him.⁴³ He must take no advantage of the fears or poverty of the other party. That the mortgagor knowingly surrendered and never intended to reclaim the property is of no consequence, if there is vice in the transaction.⁴⁴

§ 1050. **Merger of mortgage in equity of redemption.**—The general rule at law is that when a greater and less estate meet in the same person, without any intermediate estate, the less estate is at once merged in the greater.⁴⁵ This rule of law is inflexible. The doctrine of merger springs from the

⁴¹ 80 Wis. 434, 5 N. W. 396.

⁴² *Villa v. Rodriguez*, 79 U. S. (12 Wall.) 323; sub nom. *Alexander v. Rodriguez*, 20 L. ed. 406.

⁴³ *Villa v. Rodriguez*, 79 U. S. (12 Wall.) 323; sub nom. *Alexander v. Rodriguez*, 20 L. ed. 406.

⁴⁴ *Villa v. Rodriguez*, 79 U. S. (12 Wall.) 323; sub nom. *Alexander v. Rodriguez*, 20 L. ed. 406.

⁴⁵ *James v. Morey*, 2 Cow. (N. Y.) 246, 14 Am. Dec. 475.

fact that when the entire equitable and legal estates are united in the same person, there can be no occasion to keep them distinct, for ordinarily it could be of no use to the owner to keep up a charge upon an estate of which he was seized in fee simple; but if there is an outstanding intervening title the foundation of the merger does not exist as a matter of law.⁴⁶

Equity does not favor the doctrine of merger; and where two or more rights or estates are united in one person, equity will keep them distinct, where from the intention of the party, either express or implied, he wishes them to be so kept.⁴⁷ Consequently, whether the mortgage, on becoming vested in the same person with the equity of redemption, is merged or continues to be a charge, depends upon the intention, actual or presumed, of the person in whom the interests are united; and this person will be presumed to intend that which is most to his advantage.⁴⁸ Hence, where the equity of redemption is

⁴⁶ *Stanton v. Thompson*, 49 N. H. 272. See *Coates v. Cheever*, 1 Cow. (N. Y.) 460.

⁴⁷ *James v. Morey*, 2 Cow. (N. Y.) 246, 14 Am. Dec. 475. See *Robertson v. Wheeler*, 162 Ill. 566, 44 N. E. 870.

⁴⁸ *Lyon v. Ilvain*, 24 Iowa, 9; *Davis v. Pierce*, 10 Me. 376; *Freeman v. Paul*, 3 Me. (3 Greenl.) 260, 14 Am. Dec. 237; *Hunt v. Hunt*, 31 Mass. (14 Pick.) 374, 25 Am. Dec. 400; *Hinchman v. Emans*, 1 N. J. Eq. (1 Saxt.) 100; *Payne v. Wilson*, 74 N. Y. 354; *Mason v. Lord*, 40 N. Y. 476, 489; *Bascom v. Smith*, 34 N. Y. 320, 329; *Champney v. Coope*, 32 N. Y. 542, 548; *Thompson v. VanVechten*, 27 N. Y. 579, 5 Abb. (N. Y.) Pr. 464, 6 Bosw. (N. Y.) 465; *Michaels v. Townsend*, 18 N. Y. 575, 582; *Clift v. White*, 12 N. Y. 519, 525, 535, 15 Barb. 75; *Spencer v. Ayrault*, 10 N. Y. 202, 204; *Warner v. Blakeman*,

36 Barb. (N. Y.) 524; *Casey v. Buttolph*, 12 Barb. (N. Y.) 639; *Reid v. Latson*, 15 Barb. (N. Y.) 14; *Averill v. Wilson*, 4 Barb. (N. Y.) 191; *Schermerhorn v. Merrill*, 1 Barb. (N. Y.) 516; *James v. Morey*, 2 Cow. (N. Y.) 246, 14 Am. Dec. 475; *Day v. Mooney*, 4 Hun (N. Y.) 134; *Starr v. Ellis*, 6 John. Ch. (N. Y.) 393; *Hitchcock v. Harrington*, 6 John. (N. Y.) 290, 5 Am. Dec. 229; *Gardner v. Astor*, 3 John. Ch. (N. Y.) 53, 8 Am. Dec. 465; *Skeel v. Sparker*, 8 Paige Ch. (N. Y.) 186; *Russell v. Austin*, 1 Paige Ch. (N. Y.) 96; *Pelletreau v. Jackson*, 11 Wend. (N. Y.) 115; *Roberts v. Jackson*, 1 Wend. (N. Y.) 484; *Patten v. Bond*, 60 L. T. 583, 585; *Thomas v. Kemish*, 2 Vern. 348, *Forbes v. Moffatt*, 18 Ves. 385, 390, 11 Rev. 222, 4 Kent. Com. 99-104.

Foundation of equitable doctrine—*Forbes v. Moffatt*.—The equitable doctrine announced by

purchased by the mortgagee a merger does not take place in those cases where it is to the interest of the mortgagee to keep the mortgage alive, and this can be done without preju-

the American courts rests largely upon the case of *Forbes v. Moffatt*, 18 Ves. 385, 11 Rev. 822, decided in 1811, in which Sir William Grant, master of the rolls, held that a mortgage is not merged by union with the fee, where such merger would be prejudicial to the owner. In this case the facts were as follows: "John Moffatt held a mortgage of certain estates to secure the payment of thirteen thousand pounds. Afterwards, the mortgagor died, having by his will devised all his property, real and personal, to the said John Moffatt, the mortgagee; and the question was, whether the mortgage was extinguished or sunk in the devise. Sir William Grant, the master of the rolls, in delivering his opinion, lays down certain principles, regulating in all questions of such a nature. He observes: 'It is very clear that a person becoming entitled to an estate subject to a charge for his own benefit, may, if he chooses, at once take the estate and keep up the charge. The question is upon the intention, actual or presumed, of the person in whom the interests are united. In most instances it is, with reference to the party himself, of no sort of use to have a charge on his own estate; and where that is the case, it will be held to sink, unless something shall have been done by him to keep it on foot. The owner of a charge is not, as a condition of keeping it up, called upon to repudiate the estate. The election he has to make

is not whether he will take the estate or the charge; but whether taking the estate he means the charge to sink in it or continue distinct from it.' Whether no intention is expressed by words or actions on the part of the mortgagee, as to the manner in which he holds the estate after acquiring the whole title, recourse is to be had to presumptive intention. On this point the master of the rolls proceeds and says: 'With regard to presumptive intention, it was evidently most advantageous for John Moffatt that this mortgage should be kept on foot, for otherwise, he would have given priority to the other mortgage, and all the debts of his brother (the mortgagor). The reasonable presumption, therefore, is that he would choose to keep the mortgage on foot. When no intention is expressed, or the party is incapable of expressing any, I apprehend the court considers what is most advantageous to him. Upon that principle it was holden in the case of *Thomas v. Kemish*, 2 Vern. 348, that the charge should not sink; as that was for the advantage of the infant." He further observes: 'Upon looking into all the cases in which charges have been held to merge, I find nothing which shows that it was not perfectly indifferent to the party in whom the interests had united, whether the charge should or should not subsist; and in that case I have already said it sinks.'"

dice to the rights of the mortgagor, or of third persons.⁴⁹ And where there is an assignment of a mortgage in process of foreclosure to the holder of the equity of redemption, and he goes on and prosecutes the foreclosure suit to judgment and sells the premises, it is presumed from such act that he does not intend to have the equity of redemption merge in the legal estate, and therefore a merger will not take place.⁵⁰ In those cases where the purchase of a senior mortgage by the purchaser of the equity of redemption, is to protect his title, this does not create a merger so as to extinguish the lien of the mortgage, and on a foreclosure by the latter the first mortgage must be the first paid.⁵¹

§ 1051. Redemption money—Lien for.—The supreme court of Michigan, in the case of *Powers v. Golden Lumber Company*,⁵² say that a lien for redemption money is an independent equity, and not merely appurtenant to the mortgage held by a mortgagee who has redeemed, so that proceedings to enforce the lien may be taken before such mortgage matures, and the discharge of the mortgage does not cut off the lien.

§ 1052. On sale under a power.—A sale of mortgaged lands under a power contained in the mortgage cuts off the equity of redemption in the absence of any statutory provision showing the right.⁵³ For this reason a court of equity will examine with the closest scrutiny such a sale and where

⁴⁹ *Vannice v. Bergen*, 16 Iowa, 555, 85 Am. Dec. 531. See *McClaskey v. O'Brien*, 16 W. Va. 847; *Hoffman v. Wilhelm*, 68 Iowa, 514, 27 N. W. 483; *Denham v. Snakey*, 38 Iowa, 271; *Millsbaugh v. McBride*, 7 Paige Ch. (N. Y.) 509, 34 Am. Dec. 360; *Duncan v. Drury*, 9 Pa. St. 332, 49 Am. Dec. 565. See also *Rothschild v. Bay*

City Lumber Co. 139 Ala. 571, 36 So. 785.

⁵⁰ *Knowles v. Lawton*, 18 Ga. 476, 63 Am. Dec. 290.

⁵¹ *Millsbaugh v. McBride*, 7 Paige Ch. (N. Y.) 509, 34 Am. Dec. 360.

⁵² 43 Mich. 468, 5 N. W. 656.

⁵³ *Powers v. Andrews*, 84 Ala. 289, 4 So. 263.

the rights of third persons have not intervened, redemption conditioned upon the full payment of all that is due the holder of the indebtedness will be allowed in case of any unfairness on the part of the trustee resulting in injury to the debtor.⁵⁴ And it is said in *Lovelace v. Hutchinson*⁵⁵ that conveyances of the mortgaged premises by the mortgagee do not stand in the way of redemption by the mortgagor or his privies from a sale under a power in the mortgage, where such conveyances are without any consideration and are fraudulent as against the mortgagor and those claiming under him.

It is said by the supreme court of Missouri, in the case of *Godfrey v. Stock*,⁵⁶ that the owner of mortgaged premises sold under a power contained in a deed of trust, who gives notice on the day of sale to the trustee and the purchaser, who is an assignee of the *cestui que trust*, of his intention to redeem, but fails to make application to the court for leave to give security for two days, on account of sickness, does not thereby lose the right to redeem under the Missouri statute,⁵⁷ allowing redemption from such sale within a year, upon condition that security be given for interest and damages and waste permitted by the owner, on the ground that he has not used diligence.

§ 1053. **Extinguishment of right of redemption.**—We have already seen that the right of redemption, being a reciprocal right,⁵⁸ is an incident of every mortgage⁵⁹ which cannot be waived⁶⁰ or surrendered,⁶¹ except by the free act of the mortgagor, in a proper manner, for an adequate consideration,⁶² evidenced by an instrument in writing,⁶³ or by judg-

⁵⁴ *Williamson v. Stone*, 128 Ill. 129, 22 N. E. 1005, aff'g 27 Ill. App. 214.

⁵⁵ 17 So. (Ala.) 623.

⁵⁶ 116 Mo. 403, 22 S. W. 733.

⁵⁷ Mo. Rev. Stat. 1889, §§ 7079, 7080.

⁵⁸ See *ante*, § 1028.

⁵⁹ See *ante*, § 1029.

⁶⁰ See *ante*, § 1036.

⁶¹ See *ante*, § 1037.

⁶² See *ante*, § 1038, *et seq.*; *O'Dell v. Mentoss*, 68 N. Y. 499, reversing

6 Hun (N. Y.) 155.

⁶³ See *ante*, § 1039.

ment of a court of competent jurisdiction, or by statutory proceedings out of court which are the equivalent of an equitable action,⁶⁴ or by the neglect of the mortgagor to assert his rights until after the running of the statute of limitations⁶⁵ or by conduct amounting to an estoppel *in pais*.⁶⁶ But in all cases where the mortgagor's equity is once extinguished it should remain absolutely blotted out forever.⁶⁷

§ 1054. Same—By action and sale.—The general rule is that a person who has taken an absolute deed as security for a loan must file a bill in order to cut off the debtor's right to redeem, and is obliged to accept the amount due and reconvey the property, where such amount is properly tendered at any time before the right to redeem is cut off.³⁸

The supreme court of Michigan, in the case of *Humphrey v. Turd*,⁶⁹ say that the mere assumption of a mortgagee, evidenced by his giving a deed, that he has title in fee, cannot bar the equity of redemption; nor can an occasional occupation under such deed, or any occupation short of a continuous and notorious one, adverse to the right to redeem, give it that effect.

In those cases where the original transaction between a mortgagor and mortgagee was not in form a mortgage, but an absolute deed, with a bond to reconvey on the payment of the money at a specified time, still it is not essential to the proper extinguishment of the right of redemption, by an arrangement between the parties themselves, that it should be done by an instrument which will operate as a technical conveyance of the mortgagor's estate in the land. If transactions have occurred between the parties which render it inequi-

⁶⁴ See *post*, § 1054.

⁶⁵ See *post*, chap. XL.

⁶⁶ *Estoppel in pais*. See *post*, § 1061.

⁶⁷ *Chapin v. Wright*, 41 N. J. Eq. 438, 5 Atl. 574; *Bates v. Conrow*,

11 N. J. Eq. (3 Stock.) 137, 2 Co. Litt. (19th ed. p. 302, § 532.

⁶⁸ *McSorley v. Hughes*, 58 Hun (N. Y.) 360, 34 N. Y. S. R. 945, 12 N. Y. Supp. 179.

⁶⁹ 29 Mich. 44.

table that the grantor should be permitted to redeem, that, of itself, without a technical release, will operate as a cancelation of the instrument of defeasance, and give to the deed the effect of an original, absolute conveyance as between the parties.⁷⁰ But where a mortgagee takes possession, not simply under his mortgage, but under a valid sheriff's deed on execution against the mortgagor for another than the mortgage debt, there can be no redemption.⁷¹

In those cases where a power is subsequently given to the trustees in a trust deed empowering them to foreclose, and authorizing the mortgagor to sell the lands and substitute the proceeds for reinvestment by the trustees as a sinking fund, and to sell the lands themselves to carry out the trust, authorizes a sale without right of redemption.⁷²

⁷⁰ *West v. Reed*, 55 Ill. 242.

⁷² *Thompson v. Ellenz*, 58 Minn.

⁷¹ *Freickencht v. Meyer*, 38 N. J. 301, 59 N. W. 1023.
Eq. (11 Stew.) 315.

CHAPTER XXXVIII.

REDEMPTION—CIRCUMSTANCES AFFECTING.

- § 1055. Extinguished by foreclosure.
- § 1056. Failure to make interested person party—Effect.
- § 1057. Same—Compelling redemption.
- § 1058. Agreement between parties.
- § 1059. Sale of equity of redemption—Effect on rights.
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- § 1061. Estoppel *in pais*.
- § 1062. Conveyance by mortgagee.
- § 1063. Two or more mortgages on one tract—Redeeming from one.
- § 1064. Separate mortgages on separate tracts—Redeeming from one.
- § 1065. Redemption by part owner—Extent of right.
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- § 1071. Same—Mortgagor's possession during—Constitutionality of statute.
- § 1072. Same—Possession by purchaser during—Accounting.
- § 1073. Same—After foreclosure—By creditor.
- § 1074. Same—Same—By junior lienor.
- § 1075. Same—Same—By assignee of junior lienor.
- § 1076. Same—Same—Conditions on.

§ 1055. Extinguished by foreclosure.—The right of a mortgagor and those claiming under him to redeem from the mortgage is extinguished by a foreclosure when properly made.⁷³ Such a foreclosure of a mortgage bars the right

⁷³ *Knox v. Armstead*, 87 Ala. 511, 13 Am. St. Rep. 65, 5 L.R.A. 297, 6 So. 311; *Willis v. McIntosh*, 1 Ga. Dec. 162; *Ballinger v. Bourland*, 87 Ill. 513, 29 Am. Rep. 69; *Werner v. Heintz*, 17 Ill. 256; *Stoddard v. Forbes*, 13 Iowa, 296; *Lewis v. Smith*, 9 N. Y. 502, 61 Am. Dec. 706; *Thompson v. Paris*, 63 N. H. 421; *Bennett v. Austin*, 81 N. Y. 308; *Beaufort County Lumber Co. v. Dail*, 112 N. C. 350, 17 S. E. 527,

of redemption of the mortgagor and of all persons claiming under him, including minor heirs; and such heirs have no right to redeem on showing a want of actual notice, or the failure to have a guardian *ad litem* appointed and notice given

denying rehearing in 111 N. C. 120, 15 S. E. 941; *Shackley v. Homer*, 87 Neb. 146, 127 N. W. 145; *Payne v. Long-Bell Lumber Co.* 9 Okl. 683, 60 Pac. 235; *White v. Smith*, 174 Mo. 186, 73 S. W. 610.

As to when redemption may be made, see full discussion, *post*, chap. XLI.

In the case of *Bennett v. Austin*, 81 N. Y. 308, the Western Elevating Company, a general association of a trust character, took from the different owners of elevators in Buffalo instruments called leases, giving the association the right of possession and control. By a contemporaneous written contract of the Western Elevating Company with the owner of each elevator, the later was permitted to operate his elevator in the service of the Western Elevating Company at a fixed compensation per bushel, intended to pay for such service and expenses, the profits being divided among the so-called lessors. The firm of B & A, owning two elevators, so leased for a term of three years, assigned their share of the profits to S & Co., the holders of a mortgage thereon, to be applied in liquidation of the debt and of prior incumbrances. A and B, and B's wife, who had a separate interest in the two elevators, conveyed them to C to secure advances made to B & A, he knowing of the arrangement with S & Co. Afterwards C, by setting up the apparent title under his deed, and

without the consent of B & A or of S & Co., induced the Western Elevating Company to substitute for the lease a new one from himself as owner of the two elevators, of which he took possession, thenceforth receiving and retaining the dividends. Thereupon S & Co. foreclosed their mortgage, and, by an arrangement with them, C, after judgment, obtained control of the sale and became the purchaser for the amount of the judgment. In an action by B and wife to have the deed to C declared a mortgage, and to redeem, the court held: (1) that C's widow and devisee could not, in equity, avail herself of the title obtained on foreclosure sale to defeat the plaintiffs' equity of redemption, they having the right to have the dividends set apart for the reduction of the mortgage of S. & Co. applied to that purpose; (2) That C, on possessing himself of the dividends, became *ex maleficio*, constructively a trustee of the fund, and the law imposed on him the duty to apply the dividends to reduce the mortgage. The purchase in his own behalf, taking advantage of his own wrong, did not cut off the right to redeem; (3) That B, having no defense to the mortgage, was not, by not defending against the foreclosure, precluded from contesting the title obtained under it; (4) That B's rights were not affected by the usual clause in the foreclosure decree authorizing any party to the action to become a pur-

to him.⁷⁴ A decree against a defendant made party to a foreclosure suit under a general allegation that he claimed some interest in the premises "as subsequent purchaser or incumbrancer, or otherwise," bars rights and interests in the equity of redemption, but not those which are paramount to the title of both mortgagor and mortgagee.⁷⁵

But the equity of redemption is not extinguished by a decree of foreclosure until the decree is executed by a sale; ⁷⁶ consequently, one who purchases after the decree and before the sale thereunder, becomes the owner of the right to redeem.⁷⁷ In those cases where a power in a mortgage giving the mortgagee the right to purchase as if he were not a party, when exercised without fraud or oppression, deprives the mortgagor of the right to redeem.⁷⁸

The supreme court of North Carolina, in the case of Beaufort County Lumber Company v. Dail,⁷⁹ say that the equity of redemption in timber on mortgaged land, conveyed by the mortgagor to the holder by assignment of the mortgage, who makes a verbal agreement that the mortgage shall not embrace the timber; is cut off by foreclosure of the mortgage by a subsequent assignee, as against one to whom the equity of redemption is conveyed after the assignment of the mortgage.

chaser; and this, although the facts as to the assignment of the dividends and the subsequent action of C were set forth in the complaint as a foundation of a claim against C for dividends: and (5) That the fact that C was, in his own right, owner of one-third of one of the two elevators, did not alter the case further than merely to reduce the amount he was bound to apply on the mortgage of S. & Co.

⁷⁴ *Thompson v. Paris*, 63 N. H. 421.

⁷⁵ *Lewis v. Smith*, 9 N. Y. 502, 61 Am. Dec. 706.

⁷⁶ See *Barnard v. Jersey*, 39 Misc. 212, 79 N. Y. Supp. 380.

In Wisconsin the equity of redemption is not extinguished until the sale has been confirmed. *Gerhardt v. Ellis*, 134 Wis. 191, 114 N. W. 495.

⁷⁷ *Willis v. Smith*, 66 Tex. 31.

⁷⁸ *Knox v. Armstead*, 87 Atl. 511, 13 Am. St. Rep. 65, 5 L.R.A. 297, 6 So. 311.

⁷⁹ 112 N. C. 350, 17 S. E. 527, denying re-hearing in 111 N. C. 120, 15 S. E. 941.

§ 1056. Failure to make interested person party—Effect.—The right to redeem from a mortgage is incident to every mortgage,⁸⁰ and belongs to the mortgagor and every person claiming under him. This right cannot be extinguished except by due process of law,⁸¹ or the acts or omissions of the party himself.⁸² Every person interested in the mortgaged property and entitled to redeem from the mortgage, must be made a party to the proceeding and given an opportunity of exercising his right to redeem, otherwise the proceedings, as to those not made parties, will be a nullity.⁸³ Thus the supreme court of Iowa have held that a purchaser at a tax sale of land mortgaged to the school fund is not cut off from his right to redeem from such mortgage by foreclosure proceedings to which he is not made a party.⁸⁴ In those cases where a mortgage has been foreclosed in an action to which a junior lien-holder has not been made a party, the purchaser under the foreclosure may maintain an action requiring the junior lien-holder to exercise his right of redemption, and in default

⁸⁰ See ante, § 1029.

⁸¹ See ante, §§ 1053, 1054.

⁸² See post, § 1061.

⁸³ *Murdock v. Ford*, 17 Ind. 52; *Ayers v. Adair County*, 61 Iowa, 728, 17 N. W. 161; *Shaw v. Heisey*, 48 Iowa, 468; *Johnson v. Harmon*, 19 Iowa, 56; *Bates v. Ruddick*, 2 Iowa, 423, 65 Am. Dec. 774; *Barker v. Child*, 25 N. J. Eq. (10 C. E. Gr.) 41; *Miner v. Beekman*, 50 N. Y. 337, 14 Abb. (N. Y.) Pr. N. S. 1, 42 How (N. Y.) Pr. 33; *Sellwood v. Gray*, 11 Oreg. 534, 5 Pac. 196; *Noyes v. Hall*, 97 U. S. 34, 24 L. ed. 909.

In Illinois actual and open possession of land is equivalent to registry.—Under this statute the case of *Noyes v. Hall*, 97 U. S.

34, 24 L. ed. 909, arose. In this case A, the owner in fee of certain land which was mortgaged to B, contracted in writing to sell and convey it to C, who thereupon entered, and thereafter remained in open possession. The agreement was foreclosed by suit, and the deed was given to C; but, before the deed was given B's mortgage was subsequently carried out, and premises were sold in accordance with the decree. The court held that C, not having been made a party to the foreclosure suit, was not bound by it, and was, notwithstanding the decree and sale, entitled to redeem.

⁸⁴ *Ayers v. Adair County*, 61 Iowa, 728, 17 N. W. 161.

thereof is entitled to a decree cutting off such right of redemption.⁸⁵

§ 1057. **Same—Compelling redemption.**—The court of chancery of New Jersey, in the case of *Parker v. Child*,⁸⁶ say that a first mortgagee, on purchasing at his foreclosure sale, may require a second mortgagee, who by oversight was not made a party to the suit, to redeem within a reasonable time or to be foreclosed;⁸⁷ and this, not only for the amount of principal and interest due, but also for the purchase-money paid by him over and above such amount, in liquidation of claims prior to the second mortgage, to the rights of the holders of which claims the purchaser had been thereby subrogated. And in Kansas it is held that a mortgagee in possession, having the right to retain possession against the holder of the legal title may bring suit to have his rights adjudicated.⁸⁸

§ 1058. **Agreement between parties.**—The parties to a mortgage have the same right and power to contract respecting the mortgaged bonds as they would have if they did not sustain the relation of mortgagor and mortgagee; the only difference is that the terms of the agreement and the means or influences used to bring it about will be much more rigidly scrutinized to prevent fraud and oppression.⁸⁹ Thus it has been held by the supreme court of Illinois, that an agreement by which, in consideration of quitclaim deeds of the mortgaged premises to the mortgagee, he gives an extension of time for a portion of the debt, and a right to redeem a certain part of them upon payment of a certain portion of the debt, may be enforced.⁹⁰ But the acceptance of a quitclaim or other deed

⁸⁵ *Shaw v. Heisey*, 48 Iowa, 468.

⁸⁶ 25 N. J. Eq. (10 C. E. Gr.) 41.

⁸⁷ See also *Kelly v. Houts*, 30 Ind. App. 474, 68 N. E. 408.

⁸⁸ *Henthorn v. Security Co. as trustee, etc.* 70 Kan. 808, 79 Pac.

653; *Jaggard v. Plunkett*, 81 Kan.

565, 25 L.R.A. (N.S.) 935, 106 Pac. 280.

⁸⁹ See *ante*, §§ 1033, 1044.

⁹⁰ *Union Mutual Life Insurance*

of the grantor's right to redeem an estate under mortgage, does not impose upon the grantee an obligation to pay the mortgage debt, and redeem the estate; and he may afterwards become the assignee of the mortgage, without thereby discharging it.⁹¹

The court of chancery of New Jersey, in the case of *Snyder v. Greaves*,⁹² say that a mortgagee who, upon the foreclosure of his mortgage, agrees with the mortgagor to purchase the property at the sale and convey it to the mortgagor, continues to hold the title after such purchase, as security only for the payment of the amount due upon his decree, and if he fails to convey, the mortgagor may redeem.⁹³

§ 1059. Sale of equity of redemption—Effect on Rights.—The voluntary sale by the mortgagor of his equity of redemption extinguishes the right of himself and those claiming under him to redeem the mortgaged premises from the lien of the mortgage.⁹⁴ The same is true where there is a sale on execution for other indebtedness.⁹⁵ Such a sale deprives the holder of the mortgage indebtedness of his right of election of remedies, between suit on the notes or foreclosure.⁹⁶ The supreme court of Illinois, in the case of *Rogers v. Mey-*

Co. v. Kirchoff, 133 Ill. 368, 27 N. E. 91, aff'g 33 Ill. App. 607.

⁹¹ *Rogers v. Meyers*, 68 Ill. 92; *Randall v. Bradley*, 65 Me. 43; *Adams v. Hudson County Bank*, 10 N. J. Eq. (2 Stock.) 535, 64 Am. Dec. 469.

⁹² 21 Atl. 291.

⁹³ In the case of *Hensley v. Whiffin*, 58 Iowa, 426, A, a junior mortgagee, after foreclosure of the first mortgage, made an agreement with B, by which B was paid \$2,500 to buy the certificate of sale and was to convey a certain portion of the land to A upon payment of \$1,800,

and the balance, if A should want it, for \$1,200; if the owner of the equity redeemed, B was to have all the redemption money. The court held that A had no right to redeem from B by paying \$2,500.

⁹⁴ See *Braun v. Vollmer*, 89 App. Div. 43, 85 N. Y. Supp. 319. See also *Harris v. Masterson*, 91 Tex. 171, 41 S. W. 482.

⁹⁵ An equity of redemption cannot be sold upon two or more executions jointly in favor of different creditors. *Chapman v. Androcoggin R. R. Co.* 54 Me. 160.

⁹⁶ *Rogers v. Meyers*, 68 Ill. 92.

ers,⁹⁷ say that the purchase on execution of the mortgagor's equity of redemption by a stranger to the mortgage, for other indebtedness, will not affect the right of the mortgagee or his assignee to resort to any or all the remedies he had before. Such a purchase will not render the purchaser a debtor of the mortgagee or his assignee, and release the mortgagor, either at law or in equity. Therefore, the mortgagor has no right in equity to compel such purchaser to redeem from his mortgage or lose his debt. The mortgage creditor may do so, if he chooses, by foreclosure.

In a case where a redemption of land, sold under a decree of foreclosure, was made after the death of the debtor by a judgment creditor, whose execution was void, and who had no right to levy and sell under the same, and the redemption money was accepted and acted upon as valid by the prior creditor, the court held that the acceptance operated to extinguish the prior sale, the same as if the redemption had been properly made, and re-invested the heirs-at-law of the deceased debtor with the title to the land, and that they were not precluded from contesting the title claim by such redeeming creditor, by sale under his execution.⁹⁸

§ 1060. Payment after breach of condition—Effect.—

The general rule is that where the mortgagor pays the debt after the law day has expired, he will not be entitled to maintain an action at law against the mortgagee for the possession,⁹⁹ because such payment of the mortgage, after forfeiture, does not divest the mortgagee of his legal estate;¹ it simply gives to the mortgagor a right of action in equity to compel a reconveyance.² But receiving in whole or in part the mortgage debt included in a decree of foreclosure after it has be-

⁹⁷ 68 Ill. 92.

⁹⁸ *Clingman v. Hopkie*, 78 Ill. 152.

⁹⁹ *Doton v. Russell*, 17 Conn. 146, 154; *Smith v. Vincent*, 15 Conn. 1, 38 Am. Dec. 52.

¹ *Cross v. Robinson*, 21 Conn. 387.

² *Dudley v. Caldwell*, 19 Conn. 228; *Smith v. Vincent*, 15 Conn. 1, 38 Am. Dec. 52.

come absolute, will let in the mortgagor to redeem, because this will constitute a waiver on the part of the mortgagee of existing forfeitures.³

§ 1061. *Estoppel in pais*.—A mortgagor, and those claiming under him, may be estopped by their own acts from exercising the right of redemption from a person who has purchased the land on the strength of their acts or words.⁴ Thus, the supreme judicial court of Massachusetts, in the case of *Fay v. Valentine*,⁵ say that a subsequent mortgagee will be estopped to redeem the premises as against a prior mortgagee's assignee, whom the subsequent mortgagee induced to purchase the mortgaged premises on the assurance that he would never redeem them. In discussing the question the court say: "In the case of *Mocatta v. Murgatroyd*,⁶ Lord Cowper decided that a prior mortgage should be postponed to a subsequent one, merely on the proof that the prior mortgagee was a witness to the subsequent mortgage."⁷ So far as this goes

³ *Gleason v. Whitney*, 51 Vt. 552. See post, § 1070.

As to redemption after foreclosure, see post, chap. xli.

⁴ *Mansfield v. Kilgore*, 86 Neb. 452, 125 N. W. 1078. See *Mahaffy v. Faris*, 144 Iowa, 220, 24 L.R.A. (N. S.) 840, 122 N. W. 934. See also *King v. King*, 215 Ill. 100, 74 N. E. 89. But see *Eubanks v. Becton*, 158 N. C. 230, 73 S. E. 1009; *Rich v. Morisey as ex'r. etc.* 149 N. C. 37, 62 S. E. 762.

⁵ 29 Mass. (12 Pick.) 40, 22 Am. Dec. 397.

⁶ 1 Pr. Wms. 394.

⁷ In the case of *Hudson v. Cheyney*, 2 Vern. 150, a mother who, being absolute owner of a term, was present at a treaty of marriage of her son, and heard him declare that the term was to come to him

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on her death, and did not disclose her true interest, was compelled to make good the settlement, and to settle the revision accordingly after her death.

In the case of *Hanning v. Ferrers*, 1 Eq. Cas. Abr. 357, the facts were, that the first son of a tenant for life who was entitled to a remainder in tail on the death of his father, and who knew that the estate was entitled, nevertheless encouraged a person to take a lease from the father for thirty years, and to lay out considerable sums of money in new buildings and improvements, in order to reap the advantage thereof if he should survive his father. It was decided that this was such a fraud as ought to be discountenanced in a court of equity; and it was accordingly de-

to impute notice to a witness of the contents of a deed merely from his attestation, it must be considered as very properly overruled by Lord Hardwick in the case of *Wedford v. Beezely*,⁸ and again by Lord Thurlow in *Beckett v. Cordley*;⁹ but in none of these cases was it doubted, that if a mortgagee has actual knowledge of the contents of a subsequent mortgage, and nevertheless stands by and witnesses the execution of the second mortgage without disclosing his prior incumbrance, this would be such a fraud in him as would authorize a court of equity to postpone such prior incumbrance, so as to let in the subsequent mortgage. And the supreme court of Vermont, in the case of *Wright v. Whitehead*,¹⁰ say that a mortgagor who has joined with the mortgagee in selling the mortgage

cred that the lessee should not be disturbed for the residue of the term that remained unexpired after the father's death.

In the case of *Hobbs v. Norton*, 1 Vern. 136, it appeared that the defendant was issue in tail under a settlement, and that he encouraged the plaintiff to purchase an annuity of the younger son given by the father's will, though it did not appear that the defendant had any notice of the settlement at the time when he encouraged the plaintiff to proceed in the purchase; yet it was decreed that the annuity should be confirmed to the plaintiff, merely on the encouragement given.

In *Raw v. Pote*, 2 Vern. 239, Prec. Ch. 35, a widow, who had a jointure settled on her for life by her husband, was relieved against an entail fraudulently concealed and then set up against her by the defendant, who was privy to the entail, and who engrossed the jointure deed in her favor.

In *Peter v. Russell*, 2 Vern. 726, it was decided, that if a mortgagee

of a leasehold estate lends the original lease to the mortgagor for the purpose of enabling him to take up more money, which is accordingly done, and he executes a second mortgage, the first mortgage should be postponed to the second, it being considered that the first mortgagee was accessory to the fraud. Otherwise, if he was not privy to the subsequent loan, but innocently lent the lease to the mortgagor.

Where a man, with knowledge of his title, stands by, and either encourages another to purchase or does not disclose his title, he will not be allowed in a court of equity to set up his claim against the purchaser. *Savage v. Foster*, 9 Mod. 35; *Niven v. Belknap*, 2 John (N. Y.) 573; *Evans v. Bicknell*, 6 Ves. 190; Bac. Abr. Fraud, B. A similar principle is laid down in *Foster v. Briggs*, 3 Mass. 313.

⁸ Vas. Sr. 6.

⁹ 1 Bro. C. C. 357.

¹⁰ 14 Vt. 268.

premises at public auction, and receives the purchase money from one who bought in good faith, and has made valuable improvements, will be estopped by his acts from exercising the right of redemption.

§ 1062. Conveyance by mortgagee.—The general rule is that a purchaser of mortgaged premises from a mortgagee, pending a suit to redeem, will hold subject to the equities of the parties seeking the redemption.¹¹ And for this reason it is thought that the conveyance of mortgaged premises by the mortgagee do not stand in the way of redemption by the mortgagor or his privies from a sale to the mortgagee under a power in the mortgage, where such conveyances are without any consideration and are fraudulent as against the mortgagor or such privies.¹² The supreme judicial court of Maine, in the case of *Linnell v. Lyford*,¹³ say that where the equity of redemption is apparently destroyed by the mortgagee, by his conveying an indefeasible title to the premises to a *bona fide* purchaser, a court of equity will treat such mortgagee as a constructive trustee for the balance in his hands after deducting from the price for which the land was sold the amount for which the defendant held it as security.

§ 1063. Two or more mortgages on one tract—Redeeming from one.—In those cases where two or more mortgages are given upon one contract of land to secure the same debt as a part of one and the same transaction, the mortgagor has no right to separate the transaction, and will be required to redeem from both mortgages.¹⁴ And where one purchases

¹¹ *Roberts v. Fleming*, 53 Ill. 196.

¹² *Lovelace v. Hutchinson*, 106 Ala. 417, 17 So. 623.

¹³ 72 Me. 280.

¹⁴ In *Stanchfield v. Milliken*, 71 Me. 567, certain mill fixtures, which were afterwards incorporated into the real estate, were mortgaged as

personal property to secure the same debt, which deeds of the land were taken to secure. The court said the complainant could redeem from the whole or none; he had no right to separate the transaction.

Stanchfield v. Milliken, 71 Me. 567; *Wells v. Tucker*, 57 Vt. 223.

land subject to two mortgages, each on an undivided half of the estate, agreeing as part of the consideration to pay these mortgages, he cannot maintain a bill to redeem one of them so as to hold an undivided half of the land free, without redeeming both.¹⁵

But in those cases where the same person holds as assignee two mortgages of real estate, the purchaser of the equity of redemption may maintain a bill to redeem from only one of them; nor will the expiration of the statutory term of foreclosure upon the other mortgage prevent a decree in his favor as to the mortgage he seeks to redeem.¹⁶

§ 1064. Separate mortgages on separate tracts—Redeeming from one.—The general rule is that where several mortgages of different estates by the same mortgagor have been given to or become united in one person, and the equity of redemption is afterwards conveyed to different individuals by the mortgagor, or levied upon and sold under execution, no purchaser can redeem his estate without redeeming all the mortgages, no matter whether he purchased before or after the union in the plaintiff, or whether he did or did not have notice of such mortgages. In such a case the first purchaser of part of the estate in point of time has the first right to redeem from all the mortgages, and, in case of his default, the subsequent purchasers have successively rights to redeem.¹⁷ In a

¹⁵ *Wells v. Tucker*, 57 Vt. 223.

¹⁶ *Milliken v. Bailey*, 61 Me. 316.

¹⁷ *Franklin v. Gorham*, 2 Day (Conn.) 142, 2 Am. Dec. 86; *Beevar v. Luck*, L. R. 4 Eq. 537.

In the case of *Franklin v. Gorham*, *supra*, a mortgagor, to secure a debt due the mortgagee, mortgaged to him two pieces of land by separate deeds; a creditor of the mortgagor levied an execution on the latter's right in one of the pieces; it was held that the creditor

was entitled to redeem both by paying the whole mortgage debt, but could not redeem the piece set off to him on execution, by paying such proportion of the whole mortgaged premises.

The English rule is thought to be different. In the recent case of *Minter v. Carr* (C. A.), 1894, 3 Ch. 498, it is said the holder of first mortgages on two properties belonging to the same mortgagor cannot consolidate them so as to pre-

case, however, where A advanced money to B to redeem certain land, and took a mortgage on it as security, together with a mortgage on other land which was found to be incumbered with liens, and as an indemnity against such liens, B allowed A to hold a third piece of land, which A already held in his own name, but had purchased with B's money, the court held that B might redeem this third lot by payment of the liens only, and that said lot was not liable generally for all of B's indebtedness.¹⁸

§ 1065. Redemption by part owner—Extent of right.—

The rule laid down in the last two preceding sections which requires that the whole of the mortgage debt or debts, be paid on redemption, is for the protection of the mortgagee. He may waive his right to enforce redemption for the whole amount and accept a proportionate amount of the mortgage debt or debts from any one entitled to redeem, and by his voluntary release may discharge his lien from any portion of the mortgaged premises without jeopardizing his lien for the balance, by deducting from his claims the amount which, under the special circumstances, is just and equitable.¹⁹ In those cases where the mortgagee has equities which require

vent a purchaser of one of the properties under a second mortgage from redeeming it alone, where the first mortgages were not united in the same ownership until after the giving of the second mortgage.

¹⁸ *Hardin v. Eames*, 5 Ill. App. 153.

¹⁹ See *Birnie v. Nain*, 29 Ark. 591; *Meacham v. Steel*, 93 Ill. 135; *Hawke v. Snyder*, 86 Ill. 197; *Stewart v. McMahan*, 94 Ind. 389; *Wolf v. Smith*, 36 Iowa, 454; *Douglas v. Bishop*, 27 Iowa, 214; *Gibson v. McCormick*, 10 Gill & J. (Md.) 65; *Bank v. Thayer*, 136 Mass. 459; *Clark v. Fontain*, 135

Mass. 464; *Wing v. Hayford*, 124 Mass. 249; *Draper v. Mann*, 117 Mass. 439; *Parkham v. Welch*, 36 Mass. (19 Pick.) 231; *Benton v. Nicoll*, 24 Minn. 221; *Hill v. Howell*, 3 N. J. Eq. (10 Stew.) 25; *Logan Assoc. v. Braghen*, 27 N. J. Eq. (12 C. E. Gr.) 98; *Mount v. Potts*, 23 N. J. Eq. (8 C. E. Gr.) 188; *Trustees of Union College v. Wheeler*, 61 N. Y. 88; *Stuyvesant v. Hall*, 2 Barb. Ch. (N. Y.) 151; *Guion v. Knapp*, 6 Paige, Ch. (N. Y.) 35, 29 Am. Dec. 741; *Howard Ins. Co. v. Holsey*, 4 Sandf. 565, aff'd 8 N. Y. 271, 59 Am. Dec. 478; *Martin's Appeal*, 97 Pa. St. 85.

for their full protection that he shall resist redemption from any portion of the estate, the balance of the estate may be compelled to contribute its equitable share; or the mortgagee may defeat the attempt to redeem at his election. Thus where the mortgagee by grant or estoppel holds an interest in the equity of redemption; or where several persons are entitled to redeem, but some are barred by the statute of limitations, the owners of the remaining equity, or the persons whose right is not barred, may redeem their shares by paying their respective proportions of the debt secured by the mortgage.²⁰ And where the mortgagee or holder of the mortgage has foreclosed on a portion of the premises and acquired the title thereto, he may require the owners of the equity of redemption in the remaining portion to redeem by paying the amount of the debt with which the remaining land is equitably chargeable.²¹

The general rule under the statutes of many of the states require the owner of an undivided interest in land seeking to redeem, to redeem the whole, and not simply his interest.²² We have already seen that where a person interested in the mortgaged property is not made a party his right to redeem is not extinguished by the action;²³ and where such omitted person is the owner of a part of the mortgaged premises, he is entitled to redeem his land by paying a fair share of the mortgage debt.²⁴ A like rule applies to a case where a junior lienor, who has a mortgage on a portion of the premises, is not made a party to the proceedings in foreclosure.²⁵

§ 1066. Same—Remedy on.—Where a person having an interest in the whole or a portion of the mortgaged prem-

²⁰ *Fogal v. Pirro*, 17 Abb. (N. Y.), Pr. 113, 10 Bosw. (N. Y.) 100.

²¹ *Dukes v. Turner*, 44 Iowa, 575; *Dooley v. Potter*, 140 Mass. 49; *George v. Wood*, 93 Mass. (11 Allen) 41; *Fogal v. Pirro*, 17 Abb. (N. Y.) Pr. 113, 10 Bosw. (N. Y.) 100.

²² *Eiceman v. Finch*, 79 Ind. 511.

²³ See *ante*, § 1056.

²⁴ *Green v. Dixon*, 9 Wis. 532.

²⁵ *Grattan v. Wiggins*, 23 Cal. 16; *Fink v. Murphy*, 21 Cal. 108, 81 Am. Dec. 149; *Kirkham v. Dupont*, 14 Cal. 559; *Martin v. Kelley*, 59 Miss. 652.

ises is compelled to redeem the entire estate to protect that interest, he will be subrogated to the rights of the mortgagor,²⁶ and may enforce his claim against those who ought to contribute ratably,²⁷ and have the mortgaged debt apportioned as justice may require.²⁸

§ 1067. **Statutes regulating redemption.**—The time within which a redemption must be made in mortgage foreclosures is regulated by statute in the various states.²⁹ After a sale under a foreclosure decree, and the expiration of the statutory time for redemption, a bill in equity cannot be maintained to reverse the decree.³⁰

In the case of *White v. Crow*,³¹ however, where A had the right to redeem certain property from the lien of several judgments, and he redeemed from all but one, the validity of which he disputed, and the time ran by within which, under the statute, he should have redeemed from that. The court held that he should be allowed to redeem or to have returned to him the amount paid for redeeming the other judgments. It is said the case of *Knox v. Armstead*³² that a power in a

²⁶ See *ante*, § 827.

²⁷ See *post*, chap. XLIV.

²⁸ *Andrews v. Hubbard*, 50 Conn. 351; *Lyons v. Robbins*, 45 Conn. 513; *Smith v. Kelly*, 27 Me. 237, 46 Am. Dec. 595; *Allen v. Clerk*, 34 Mass. (17 Pick.) 47; *Gibson v. Crehore*, 22 Mass. (5 Pick.) 152; *Tillinghast v. Frye*, 1 R. I. 53.

²⁹ See *Bartleson v. Munson*, 105 Minn. 348, 117 N. W. 512.

In *Arkansas* there is no right of redemption from a sale under a deed of trust executed prior to the Act of March 17, 1879, (Mansf. Dig. § 4759) providing for the redemption of property from mortgage sales. *Hudgins v. Morrow*, 47 Ark. 515.

In *Nevada* there is no right of redemption from a purchaser at a foreclosure sale. That right only exists for a reasonable time after breach as against the mortgagee, who has not sold the property. And the fact that the purchaser knows that his vendor is only a mortgagee, makes no difference as to the character of title acquired by the purchase. *Bryant v. Carson River Lumbering Co.* 3 Nev. 313, 93 Am. Dec. 403.

³⁰ *Burley v. Flint*, 105 U. S. 247, 26 L. ed. 986.

³¹ 17 Fed. 98.

³² 87 Ala. 511, 13 Am. St. Rep. 65, 5 L.R.A. 297, 6 So. 311.

mortgage giving the mortgagee the right to purchase as if he were not a party, when exercised without fraud or oppression, deprives the mortgagor of the right to redeem. The supreme court of Illinois, in the case of *Anderson v. Olinroden*,³³ say that the foreclosure of a mortgage by a pledgee of it as collateral security, to which the mortgagee is made a party, but in which he fails to appear because of an alleged mistake as to the land involved; the rendering of a decree awarding a sale, allowing the pledgee or any party to the suit to become a purchaser, and ordering that in case the premises are not redeemed within fifteen months, all the defendants be barred of all right and equity of redemption therein; a purchase by the pledgee; and the lapse of the fifteen months, cut off all right and equity of redemption of the mortgagee in the premises.

In *Jackson v. Lawrence*,³⁴ where the debtor executed a deed absolute in terms to his creditor, with the verbal agreement that it was to secure a note, and that, if the note was not paid at maturity, the creditor should be authorized to sell the land, a *bona fide* purchaser of the land on a sale by the creditor after default, who paid just the amount due on the note, took the land free from all rights of creditors of the first grantor who levied an attachment on the land prior to the sale. Such attaching creditor of the mortgagee has no right of redemption.

§ 1068. Same—Designating a shorter time.—Where the statute prescribes the period within which a redemption may be made after a foreclosure sale, the mortgagor and those claiming under him are entitled to the last hour of the last day in which to make redemption. Thus the supreme court of Illinois, in the case of *Hollingsworth v. Koon*,³⁵ hold that

³³ 145 Ill. 168, 34 N. E. 55, aff'g
44 Ill. App. 294.

³⁵ 117 Ill. 511, 8 N. E. 193, 6 *Id.*
148.

³⁴ 117 U. S. 697, 29 L. ed. 1024,
6 Sup. Ct. Rep. 915.

it is error to direct the dismissal of a bill to redeem if the plaintiff fail to pay within three months, saying that the full statutory period should be allowed. And the supreme court of Minnesota, in the case of *Hollingsworth v. Campbell*,³⁶ say the provisions of the statute of that state³⁷ declaring that "in case of strict foreclosure no final decree of foreclosure shall be rendered until the lapse of one year after the judgment adjudging the amount due on such mortgage," applies to the judgment in an action to redeem, so that it is erroneous if it limits the time for redemption to a period less than one year from the date of rendering the judgment.

§ 1069. Same—Filing deed or certificate under.—It is thought in those cases where the statute governing the foreclosure of mortgages requires the deed given by the sheriff on sale of the premises to be deposited with the register of deeds, and then declares that unless the premises are redeemed within the time provided by the statute the deed shall thereupon become operative, and may be recorded, and shall vest in the grantee of all the right and title that the mortgagor had; should redemption not be made within a year from such sale and deposit of the deed, the right of redemption becomes forever barred; and it is not necessary that the deed be actually recorded in order to bar the equity of redemption.³⁸ Under the Michigan statute³⁹ the sheriff's deed on foreclosure at law should be filed immediately after the sale; and where this is done without unreasonable delay, the year for the redemption of the premises runs from the date of filing.⁴⁰ Under the Minnesota statute⁴¹ a certificate of sale which con-

³⁶ 28 Minn. 18, 8 N. W. 873.

³⁹ Mich. Comp. L. § 6920.

³⁷ Minn. Gen. Stat. 1878, c. 81, § 43.

⁴⁰ *Lilly v. Gibbs*, 39 Mich. 394.

³⁸ *Sanford v. Cahoon*, 63 Mich. 223, 20 N. W. 840. See *Lilly v. Gibbs*, 39 Mich. 394; *Wells v. Atkinson*, 24 Minn. 161.

⁴¹ Minn. Gen. Stat. c. 81, tit. I, § 11.

tains the date of the sale, and a recital that the "premises are subject to redemption within the time and according to the statute," is a sufficient compliance with the statute as to stating the time of redemption.⁴²

§ 1070. Same—Accepting part payment—Effect.—It has been said that payments made after foreclosure by advertisement, and received with the clear understanding that the redemption is to be completed by paying the whole sum necessary for that purpose, within the year allowed by the statute will be regarded as in affirmance and not in avoidance of the sale, and for that reason their acceptance does not operate as a waiver of the foreclosure.⁴³

The receiving of the whole or a part of the mortgage debt either directly or indirectly after the time for redemption has expired is of itself sufficient to let in the mortgagor to redeem.⁴⁴

§ 1071. Same—Mortgagor's possession during—Constitutionality of statute.—It has been held that a statute, providing the mortgagor shall, upon payment of interest, retain possession of the mortgaged premises during the period of redemption after foreclosure, does not impair the mortgage contract; because it affects the remedy only.⁴⁵ But this doctrine has not proved entirely satisfactory to the profession and the courts. In the case of *Barnitz v. Beverly*,⁴⁶ the

⁴² *Wells v. Atkinson*, 24 Minn. 161.

⁴³ *Cameron v. Adams*, 31 Mich. 426. See *ante*, § 1056.

⁴⁴ *Findlay v. Longe*, 81 Vt. 523, 71 Atl. 829.

⁴⁵ *Berthold v. Fox*, 13 Minn. 501, 97 Am. Dec. 243.

⁴⁶ 163 U. S. 118, 41 L. ed. —, 16 Sup. Ct. Rep. 1042, reversing, 55 Kan. 466, 31 L.R.A. 74; 49 Am. St. Rep. 257, 42 Pac. 725.

⁴⁷ In an early case (*Watkins v. Glenn*, 55 Kan. 417, 31 L.R.A. 82, 40 Pac. 317), the supreme court of Kansas held that the Act in question, in so far as it assumed to operate retrospectively, was in violation of Section 10, of Article I, of the Federal Constitution. The opinion of Chief Justice Horton, of the Kansas supreme court, in that case, is a very able and satisfactory exposition of the law. A

supreme court of the United States, in reversing the Kansas ⁴⁷ supreme court, held that the Kansas statute,⁴⁸ providing that mortgagors shall have eighteen months for redemption, with full right of possession during that time, and forbidding another sale of the land for any deficiency in the first sale, is unconstitutional as applied to mortgages executed before its passage, because impairing, or tending to impair, the obligation of contracts. It is thought that such decision has been generally looked for by a large majority of the profession throughout the Union; and the fact that it is unanimously rendered by the highest tribunal in the land will doubtless have a salutary effect.

The gist of the argument in favor of the constitutionality of such statutes is that a redemption privilege granted to a mortgagor affects only the remedy and not the right. Such a contention is thought to be fallacious in theory and contrary to the substantial purport of many decisions of the supreme court of the United States.⁴⁹

change in the personnel of the Bench having occurred, the question was again brought up in *Beverly v. Barnitz*, 55 Kan. 466, 31 L.R.A. 74, 42 Pac. 725, and it was held that the statute was intended to be retroactive, and that it was not unconstitutional. Numerous decisions of the Federal courts are cited in the opinions in both the cases in the supreme court of Kansas.

⁴⁸ Kan. L. 1893, c. 109.

⁴⁹ In the last decision on the question by the United States Supreme Court the opinion by Mr. Justice Shiras, after reviewing the earlier cases, continues as follows: "Under the law, as it existed at the time when the mortgage was made, after a foreclosure and sale of the mortgaged premises, the

purchaser was given actual possession as soon as the sale was confirmed and the sheriff's deed issued. Thereafter the mortgagor or owner had no possession, title or right in any way to the premises.

"Under the new law the mortgagor shall have eighteen months from the date of sale within which to redeem, and in the meantime the rents, issues and profits, excepting what is necessary to keep up repairs, shall go to the mortgagor or the owner of the legal title, who in the meantime shall be entitled to the possession of the property. The redemption payment is to consist, not of the mortgage debt, interest and costs, but of the amount paid by the purchaser, with interest, costs and taxes. In other words, the act

§ 1072. Same—Possession by purchaser during—Accounting.—In the case of *Dailey v. Abbott*,⁵⁰ it is held that where the purchaser takes possession before the period

carves out for the mortgagor or the owner of the mortgaged property an estate of several months more than was obtainable by him under the former law, with full right of possession, and without paying rent or accounting for profits in the meantime. What is sold under this act is not the estate pledged (described in the mortgage as a good and indefeasible estate of inheritance, free and clear of all incumbrance), but a remainder—an estate subject to the possession, for eighteen months, of another person, who is under no obligation to pay rent or to account for profits. The twenty-third section of the act should not be overlooked, providing that real estate once sold upon order of sale, special execution, or general execution shall not again be liable for sale for any balance due upon the judgment or decree, under which the same is sold or any other judgment or lien inferior thereto, and under which the holder of such lien had a right to redeem. Obviously, this scheme of foreclosure renders it necessary for the mortgagee to himself bid, or procure others to bid, the entire amount of the mortgage debt, and thus, in effect, release the debtor from his personal obligation.

"We, of course, have nothing to do with the fairness or the policy of such enactments as respects those who choose to contract in view of them. But it seems impossible to resist the conviction that such a change in the law is not

merely the substitution of one remedy for another, but is a substantial impairment of the rights of the mortgagee as expressed in the contract. Where in a mortgage, an entire estate is pledged for the payment of a debt, with right to sell the mortgaged premises free from redemption, can that be valid legislation which would seek to substitute a right to sell the premises subject to an estate or right of possession in the debtor or his alienees for eighteen months?

"The popular sentiment which led to the passage of the act in question in Kansas, and which, unfortunately, was strong enough to coerce the supreme court of that state to recede from the formerly sound position it had taken, is manifested on a wider scale in the present determined agitation to debase the standard of value, by making silver dollars of a fiat weight and quality the legal equivalent of gold dollars. Unfortunately there would be no remedy in the courts for Federal legislation of such character. *Legal Tender Cases*, 79 U. S. (12 Wall.) 457, 20 L. ed. 287; *Juiliard v. Greenman*, 110 U. S. 421, 28 L. ed. 204, 4 Sup. Ct. Rep. 122. It is, however a source of considerable satisfaction that the present decision of the supreme court by a unanimous vote indicates a disposition to jealously effectuate substantial rights of contract in so far as they are the subject of constitutional protection."

⁵⁰ 40 Ark. 275.

of redemption has expired, he is accountable for the rents and profits. The court say: "As long as the right to redeem exists the mortgagor is entitled to rent, if the mortgagee is in possession, taking the rents and profits. The statute prolongs the mortgagor's right of redemption for one year after the sale. The purchaser at the sale takes the place of the mortgagee, and if he takes possession of the land before the period for redemption has expired, there is no good reason why he should not be accountable for the rents and profits. On redemption he gets the money with interest. His vendor occupies no better position."⁵¹

§ 1073. Same—After foreclosure—By creditor.—In some of the States, as in Minnesota,⁵² under statutory provisions, where on redemption of mortgaged property sold on foreclosure under a power of sale is made within twelve months by the mortgagor, his heirs, executors and assigns, the senior creditor having a lien on the real estate, or some part thereof, subsequent to the mortgage, may redeem within a specified time after the expiration of the said twelve months, and each subsequent creditor having such lien may likewise redeem. Under such a statute a creditor of the grantee of the equity of redemption, having a lien on such property, may redeem as well as a creditor of the mortgagor.⁵³

§ 1074. Same—Same—By junior lienor.—Where junior lien holders are made parties to a suit to foreclose a prior lien, their equitable right to redeem will be barred, although still redemptioners under the statute;⁵⁴ but where not made a party to the foreclosure they are entitled to redeem by paying what is justly due the purchaser, and may do so even after the statutory time, and demand an accounting from a

⁵¹ Citing 2 Jones on Mortg. § 1118.

⁵² Minn. Gen. St. 1878, c. 81, § 3.

⁵³ *Hospes v. Sanborn*, 28 Minn. 48.

⁵⁴ *Frink v. Murphy*, 21 Cal. 108, 81 Am. Dec. 149.

purchaser in possession;⁵⁵ for the title of a purchaser at a mortgage foreclosure sale, although relating back to the mortgage, as against the parties to the foreclosure, does not cut off the title of a subsequent purchaser of the lien of a subsequent incumbrancer by a recorded conveyance, who was not a party, so as to prevent a redemption by such purchaser or incumbrancer.⁵⁶ But it has been said that the holder of a junior judgment not indexed at the time of the foreclosure of a senior mortgage cannot redeem after the statutory time for redemption has expired, although he was not made a party to the foreclosure.⁵⁷

§ 1075. Same—Same—By assignee of junior lienor.—A junior lienor not made a party to an action to foreclose a prior mortgage can redeem after the statutory period fixed therefor;⁵⁸ but it has been said that the assignee of a junior note and mortgage, under an unrecorded assignment, is not entitled, after the expiration of the statutory time for redemption, to redeem, in equity, on the ground that he was not made a party to the foreclosure proceedings by the senior mortgagee.⁵⁹

Where a senior mortgagee, pending his suit to foreclose, acquired the junior mortgage and a sale was had without the complaint being amended, the court held that the mortgagee, after the expiration of the year allowed by statute for redemp-

⁵⁵ *Randall v. Duff*, 101 Cal. 82, 35 Pac. 440; *Bunce v. West*, 62 Iowa, 80; 17 N. W. 179; *Newell v. Pennick*, 62 Iowa, 123, 17 N. W. 432; *American Buttonhole &c. Co. v. Burlington Mut. Loan Asso.* 61 Iowa, 464, 16 N. W. 527; *Frink v. Murphy*, 21 Cal. 108, 81 Am. Dec. 149.

⁵⁶ *Randall v. Duff*, 101 Cal. 82, 35 Pac. 440.

⁵⁷ *Sterling Manuf. Co. v. Early*, 69 Iowa, 94, 28 N. W. 458.

⁵⁸ See *ante*, § 1074.

⁵⁹ *Reel v. Wilson*, 64 Iowa, 13, 19 N. W. 814.

This is on the same principle that shuts out a junior lienor whose claim is not indexed. *Sterling Manuf. Co. v. Early*, 69 Iowa, 94, 28 N. W. 458.

tion, was estopped from maintaining a suit to redeem or to foreclose as junior mortgagee.⁶⁰

§ 1076. **Same—Same—Conditions on.**—One who seeks to redeem from a sale under foreclosure proceedings to which he was not a party on general equitable principles, after the period for statutory redemption has expired, can do so only by paying the mortgage debt, without regard to the amount for which the property sold.⁶¹

⁶⁰ *Gordon v. Lee*, 102 Ind. 125, 1 N. E. 290.

⁶¹ *Iowa County v. Beeson*, 55 Iowa, 262, 7 N. W. 597.

For full discussion of condition on which redemption may be made after foreclosure, see *post*, § 1139.

CHAPTER XXXIX.

REDEMPTION—WHO MAY REDEEM.

- § 1077. Introductory.
- § 1078. Administrator and executor.
- § 1079. Annuitant cannot redeem.
- § 1080. Assignee of mortgage.
- § 1081. Same—For support.
- § 1082. Assignee of mortgagor—Right to redeem.
- § 1083. Assignee of note given for land—May redeem, *when*.
- § 1084. Attorney may redeem, *when*.
- § 1085. Creditors may redeem, *when*.
- § 1086. Same—General creditors.
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- § 1089. Same—Having lien on land.
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- § 1091. Defendant may redeem.
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- § 1094. Grantor of lands mortgaged to secure debt of another.
- § 1095. Grantor in deed absolute in form but mortgage in *effect*.
- § 1096. Grantor in deed of trust.
- § 1097. Guardians may redeem.
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- § 1099. Holder of legal estate may redeem.
- § 1100. Holder of interest in mortgaged premises.
- § 1101. Holder of easement in mortgaged premises.
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- § 1104. Married woman mortgaging own property for husband's debt.
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- § 1116. Same—At execution sale.
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- § 1125. Tenant by the curtesy.
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- § 1127. Tenant for life.
- § 1128. Tenant for years.
- § 1129. Tenant in common.
- § 1130. Tenant in tail.
- § 1131. Title insurance company— May not redeem, when.
- § 1132. Trustee of absent debtor.
- § 1133. Wife joining in mortgage.
- § 1134. Widow may redeem.

§ 1077. Introductory.—We have already seen⁶² that the right of redemption is an incident of every mortgage; but this right can be exercised only by parties who hold the legal estate, or have an interest therein.⁶³ Anyone who has an interest in mortgaged lands, and would suffer loss by a fore-

⁶² See *ante*, § 1029.

⁶³ See *post*, § 1121.

Particularly is this true in those cases where persons having an interest are made parties to the proceedings. See *post*, § 1111.

Under Arkansas Act, December 15th, 1875, the only persons who can redeem the real estate bank-lands sold to the state, are the owners of the equity of redemption therein. *Davies v. Hunt*, 39 Ark. 574.

Minnesota Laws, 1860, c. 87, § 1, authorizes a mortgagor, or other person claiming through or under him as an assign, to redeem from Mortg. Vol. II.—93.

a foreclosure sale, not only within three years from the day of sale, but within three years after notice thereof filed in the office of the Register of Deeds. *Thompson v. Foster*, 21 Minn. 319.

A person in possession after full conveyance to a third person under parol agreement that he shall have a reconveyance upon certain conditions, will not be entitled to redeem from a sale made on the foreclosure of a mortgage made by his grantee, even though there has been a reconveyance, but the deed has not yet been recorded. *Sprague v. White*, 73 Iowa, 670, 35 N. W. 751.

closure, may redeem.⁶⁴ One entitled to redeem land from the holder of the legal title on the payment of a certain balance due, has the same right of redemption on payment of that sum as against a mortgagee of the legal title, who was chargeable with notice of his rights.⁶⁵

To entitle one to redeem he must show good title in himself, and a legal right to redeem, before he can effect the discharge of the mortgage, or remove the prior incumbrance, even though he holds the title of a mortgagor.⁶⁶ In keeping with this doctrine it has been said that a judgment declaring the plaintiff the owner of land and entitled to redeem it from the defendants as mortgagees, cannot be entered where the relation of debtor and creditor between the parties has never existed and there is no obligation of any character secured or to be secured by mortgage, since without such an obligation there can be no mortgage.⁶⁷

As between several persons entitled to redeem, they can exercise this right according to the priority of their respective claims.⁶⁸

The various persons and interests who are entitled to redeem in mortgage foreclosures are so numerous that it is thought best to treat each under its proper head, arranged alphabetically.

§ 1078. Administrator and executor.—An administrator or an executor may have such an interest in the mortgaged premises as will entitle him to redeem them, either

⁶⁴ See *post*, § 1100.

⁶⁵ *Brooke v. Bordner*, 125 Pa. St. 470, 17 Atl. 467, 24 N. W. C. 53.

⁶⁶ *Eastman v. Batchelder*, 36 N. H. 141, 72 Am. Dec. 295; *Farr v. Dudley*, 21 N. H. 372.

⁶⁷ *Shutz v. McLean*, 93 Cal. 329, 25 Pac. 427.

⁶⁸ *Haines v. Beech*, 3 Johns. Ch. (N. Y.) 459. See *Kalscheuer v.*

Upton, 6 Dak. 449, 43 N. W. 816; *Bigelow v. Springfellow*, 25 Fla. 366, 5 So. 816; *Rogers v. Heron*, 92 Ill. 585; *Dickerman v. Lust*, 66 Iowa, 444, 23 N. W. 916; *Spurgin v. Adamson*, 62 Iowa 661, 18 N. W. 293; *Moore v. Beasom*, 44 N. H. 215; *Brewer v. Hyndman*, 18 N. H. 9. See also *Morse v. Holland Trust Co.* 184 Ill. 255, 56 N. E. 369.

before or after sale.⁶⁹ Thus it has been said where the owner of land, after executing a deed of trust thereon to secure his debts, conveys it in fee simple, subject to such trust deed, and expressly reserves a lien for the purchase money, his administrator can redeem from foreclosure of the trust deed.⁷⁰

The supreme court of Washington in *In re Clement's estate*,⁷¹ say that the mortgaged property included in the residuary clause of a will is not devised, within the meaning of the Washington Statute,⁷² providing for the redemption by the executor of any mortgaged property which has not been devised.

§ 1079. Annuitant cannot redeem.—An annuitant is a person who is entitled to an annuity. An annuity is simply a yearly sum stipulated to be paid to another in fee or for life or for years and chargeable only on the person of the grantor.⁷³ An annuity is different from a rent charge, in this, —a rent charge is a burden imposed upon and issuing out of the lands, whereas an annuity is chargeable only upon the person of the grantor.⁷⁴ It is not an interest in real property; and where the annuity arises out of lands the annuitant has not an interest in the mortgaged lands entitling him to redeem from the mortgage.⁷⁵

§ 1080. Assignee of mortgage.—We shall hereafter see⁷⁶ that the assignee of a mortgagor's interest in the equity of redemption may exercise the right of redemption under

⁶⁹ *Enos v. Sutherland*, 11 Mich. 538; *Percy v. Tate*, 91 Tenn. 478, 19 S. W. 325; *Merriman v. Barton*, 14 Vt. 501. *Sharpe v. Miller*, 157 Ala. 299, 47 So. 701.

⁷⁰ *Percy v. Tate*, 91 Tenn. 478, 19 S. W. 323.

⁷¹ 8 Wash. 323, 35 Pac. 1073.

⁷² Wash. Code Proc. § 1035.

⁷³ *Wagstaff v. Lowerre*, 23 Barb.

(N. Y.) 209, 216; *Anderson's L. Dict.* 61, 2 Bl. Com. 40, 1 Bouv. L. Dict. (18th ed.) 161, 1 Co. Litt. 19th ed.) 144b, 3 Kent Com. (13th ed.) 460.

⁷⁴ *Wagstaff v. Lowerre*, 23 Barb. (N. Y.) 209, 217.

⁷⁵ *White v. Parnter*, 1 Knapp, 266.

⁷⁶ See *post*, § 1082.

similar circumstances as the mortgagor himself. On the same principle of succession in interest the assignee of a junior mortgage will have the same rights as his assignor would have had, and the fact that the assignment of the mortgage to the holder was not recorded, does not defeat such right of redemption in those cases where there is no statute providing for the recording of assignments of mortgages and making such records notices, the parties claiming under the assignment are not guilty of laches in not securing them to be recorded.⁷⁷

The supreme court of Wisconsin, in the case of *Farwell v. Murphy*,⁷⁸ say that the assignee of a second mortgage may maintain a bill for redemption against the assignee of the first mortgage, or by a bill of foreclosure make the assignee of the first mortgage a party, and obtain the usual decree of redemption against him.

The supreme court of Minnesota, in the case of *Bovey De Laittre Lumber Company v. Tucker*,⁷⁹ say that the assignee of a subsequent mortgage, under which the mortgagee has filed notice of intention to redeem from a sale under a former mortgage, may redeem under such notice.

§ 1081. Same—For support.—The supreme judicial court of Maine, in the case of *Bryant v. Jackson*,⁸⁰ hold that a bill in equity to redeem real estate from a mortgage conditioned for the support of the mortgagees and the survivor of them during life, brought by the assignee of the mortgagor against the assignee of the mortgagee, a distinct allegation that the interest of the mortgagor was assigned with the consent of the mortgagee is sufficient, although it was not alleged that such consent was in writing.⁸¹ The supreme court of Vermont, in the case of *Austin v. Austin*,⁸² say that

⁷⁷ *Hasselman v. McKernan*, 50 Ind. 441.

⁷⁸ 2 Wis. 533.

⁷⁹ 48 Minn. 223, 50 N. W. 1038.

⁸⁰ 59 Me. 165, sub nom. *Bryant v. Erskine*, 55 Me. 153.

⁸¹ See *Lovell v. Farrington*, 50 Me. 239.

⁸² 9 Vt. 420.

a mortgage conditioned for the support of the mortgagee, admits of compensation, and in those cases where the mortgagor has conveyed his interest, the purchaser will be permitted to redeem, by making compensation for past support, to be settled by the master, and paying a specific allowance for the future support.

§ 1082. Assignee of mortgagor—Right to redeem.—

The mortgagor having a right to redeem, and this right being inseparably connected with the title,⁸³ and the right being an estate in the lands,⁸⁴ any one purchasing the mortgagor's right will be entitled to redeem under the same circumstances as the mortgagor would have been entitled to do so.⁸⁵ It has been held that such assignee, where not made a party to the foreclosure proceedings, will be entitled to redeem even though his deed is not on record at the time when the decree of foreclosure is rendered.⁸⁶ In case of an assignment by the mortgagor of his interest in the equity of redemption, and a certificate of the redemption is thereafter issued in the name of the grantor to the grantee inures to the latter's benefit, where his offer to redeem in his own name has been refused by the sheriff under the direction of the mortgagee, who became the purchaser at the foreclosure sale.⁸⁷

The supreme court of Arkansas, in the case of *Scott v. Henry*,⁸⁸ say that while it is true, as a general rule, that no

⁸³ See *ante*, § 1029.

⁸⁴ See *ante*, § 1039.

⁸⁵ *Powers v. Andrews*, 84 Ala. 289, 4 So. 263; *Paulling v. Barron*, 32 Ala. 9; *Scott v. Henry*, 13 Ark. 127; *Beach v. Shaw*, 57 Ill. 17; *Gilbert v. Hussman*, 76 Iowa, 241, 41 N. W. 3; *Skinner v. Miller*, 5 Litt. (Ky.) 84; *Wilkins v. French*, 20 Me. 111; *Taft v. Stetson*, 117 Mass. 471; *Brewer v. Hyndman*, 18 N. H. 10; *Hepburn v. Kerr*, 9 Humph. (Tenn.) 726; *Hodson v.*

Treat, 7 Wis. 263; Case 114, 3 Atk. 314; *Cooper v. Maurer*, 122 Iowa, 321, 98 N. W. 124. But see *Terry v. Allen Bros.* 132 Ala. 657, 32 So. 664.

Assignee of equity of redemption after the foreclosure sale cannot redeem. *Lewis v. McBride*, 57 So. 705. (Ala.).

⁸⁶ *Hodson v. Treat*, 7 Wis. 263.

⁸⁷ *Wilber v. Miller* (Oreg.), 37 Pac. 827.

⁸⁸ 13 Ark. 127.

person can come into a court of equity for a redemption of a mortgage except he who is entitled to the legal estate of the mortgagor, or claims a subsisting interest under him, yet it is equally well settled that an assignment of a mortgage vests in the assignee the right to redeem; or one to whom a *bona fide* transfer of the mortgagor's estate is made may redeem the property; and the same rule extends to persons having any substantial interest in the property. Succeeding to all the rights of the mortgagor on the assignment, if there are circumstances which would induce the court to decree a redemption in favor of the representatives of the mortgagor, the assignee who stands in his place will have the benefit of it.⁸⁹ Thus it has been said that an assignee of the right of redemption, in a petition to redeem, may show a want or failure of consideration the same as the mortgagor himself might have done under a similar petition.⁹⁰

The supreme judicial court of Massachusetts, in the case of *Taft v. Stetson*,⁹¹ where a mortgagee entered upon land to foreclose a mortgage in which the mortgagor's wife had not joined, but did not take possession of the house, nor receive rent therefor, the wife having continued in possession of the house claiming it as a homestead, the court held that on a bill in equity to redeem, brought by an assignee of the mortgagor an accounting for rents and profits of the house could not be had.

The supreme court of Minnesota, in the case of *Cuilerier v. Brunelle*,⁹² say that a junior mortgagee is not an "assign" of the mortgagor, as the word is used in the Minnesota statute entitling assigns to redeem within a year from the foreclosure of a prior mortgage.

§ 1083. Assignee of note given for land—May redeem, when.—In the case of *Tarbell v. Durant*,⁹³ a part of certain

⁸⁹ Case 114, 3 Atk. 314.

⁹⁰ *Brewer v. Hyndmann*, 18 N. H. 10.

⁹¹ 117 Mass. 471.

⁹² 37 Minn. 71, 33 N. W. 123.

⁹³ 61 Vt. 516, 17 Atl. 44.

land held by one as mortgagee, by absolute deed, was sold, and the vendee mortgaged it to the original mortgagee, agreeing that the latter should hold the mortgage note and mortgage in place of the land so sold. The original owner of the land then assigned the note, subject to the mortgagee's interest, to orator, who, to protect his own interest, paid a subsequent decree of foreclosure procured by the mortgagee on the land remaining unsold and the note, in a suit to which orator was a party defendant. The court held that the assignee of the note had a right to redeem from the decree of foreclosure in favor of the mortgagee.⁹⁴

§ 1084. **Attorney may redeem, when.**—An attorney becomes a “creditor⁹⁵ having a lien,” within the meaning of a statute⁹⁶ relating to the redemption of real estate, where a judgment is confessed in his favor for a sum due upon a prior contract, and the confession of judgment is made for the sole purpose of enabling him to redeem.⁹⁷ Thus in one case the owner of the land, whose title was in litigation, made a contract with his attorney, to convey to him, for his services, one third of the land in case he succeeded in recovering the land. The attorney brought the litigation to a successful termination, but in the meantime certain mortgages executed by the owner having been foreclosed, and the time of redemption about to expire, and the owner, not being able to redeem, confessed judgment in favor of his attorney for his services, for an amount which does not appear to have been in excess of the value of one third of the land. The judgment was confessed to enable the attorney to redeem the land, and thereby secure compensation for his services. The court held that this con-

⁹⁴ The court cites in support of this holding, *Coop. Eq. Pl. 14*; *Hurd Eq. Pl. 45*.

⁹⁵ See *post*, § 1089.

⁹⁶ *Minn. Gen. Stat. 1878, c. 66, § 323, c. 81, § 16.*

⁹⁷ *Atwater v. Manchester Savings Bank*, 45 Minn. 341, 48 N. W. 187, 12 L.R.A. 741.

fession of judgment was not a fraud on the purchaser at the mortgage sale.⁹⁸

§ 1085. **Creditors may redeem, when.**—All creditors of the mortgagor having an interest in the mortgage premises are entitled to redeem in the order of the priority of their respective liens.⁹⁹ This right of redemption is regulated by statute in many of the states. Where a senior creditor's right to redeem becomes vested under the statute, it cannot be divested without due process of law.¹

§ 1086. **Same—General creditors.**—The simple fact that a person is a creditor of the mortgagor, or owner of the equity of redemption in mortgaged lands, will not entitle him to redeem them;² the claim must be of such a nature as to give him some interest in the mortgaged lands,—a right to look to or appropriate them to the payment of his claim,—before he will be entitled to redeem. A case which illustrates this principle has been decided by the supreme court of Maryland. The court say that a lien or quasi-lien upon the land of a decedent given by the statute of Maryland,³ making such land contingently or conditionally liable to be sold for the payment of his debts, such lien is not such a right or interest in the real estate as to give a general creditor the right to redeem from a mortgage upon such real estate, and be subrogated to the right of the mortgagee.⁴

⁹⁸ *Atwater v. Manchester Savings Bank*, 45 Minn. 341, 48 N. W. 187, 12 L.R.A. 741.

⁹⁹ See *Kalscheuer v. Upton*, 6 Dak. 449, 43 N. W. 816; *Bigelow v. Stringfellow*, 25 Fla. 366, 5 So. 816; *Rogers v. Heron*, 92 Ill. 583; *Dickerman v. Lust*, 66 Iowa, 444, 23 N. W. 916; *Spurgin v. Adamson*, 62 Iowa, 661, 18 N. W. 293; *Moore v. Beasom*, 44 N. H. 215; *Brewer v.*

Hyndman, 18 N. H. 9; *Haines v. Beach*, 3 John. Ch. (N. Y.) 459.

¹ See *Willis v. Jelineck*, 27 Minn. 18, 6 N. W. 373.

² See *National Foundry & Pipe Works, Ltd. v. Oconto City Water Supply Co.* 113 Fed. 793, 51 C. C. A. 465.

³ Md. Code, art. 16 § 188.

⁴ *McSiece v. Elison*, 78 Md. 168; 27 Atl. 940.

§ 1087. Same—Attachment and judgment creditors.—

A creditor who has caused the mortgaged property to be attached for the payment of his claim, and who is not made a party to a suit to foreclose a prior mortgage, will be entitled to redeem therefrom;⁵ because an attaching creditor who has not yet obtained judgment has a lien on the real estate attached, within the meaning of the statute⁶ relating to redemption of real estate, and which gives any one having lien a right to redeem.⁷ But it has been said by the supreme court of Missouri that an attaching creditor cannot maintain a suit to redeem land attached for a mortgage executed by the defendant in the judgment suit.⁸

A judgment creditor who has reduced his claim to judgment, and the judgment has become a contention lien on the mortgaged property, has such an interest in the premises as entitles him to redeem from the lien of a mortgage.⁹ To

⁵ *Briggs v. Davis*, 108 Mass. 322; *Atwater v. Manchester Sav. Bank*, 45 Minn. 341, 48 N. W. 187, 12 L.R.A. 741; *Chandler v. Dyer*, 37 Vt. 345.

⁶ As Minn. Gen. Stat. 1878, c. 66, § 323, c. 81 § 16.

⁷ *Atwater v. Manchester Sav. Bank*, 45 Minn. 341, 48 N. W. 187, 12 L.R.A. 741.

⁸ *Fisher v. Tallman*, 74 Mo. 39.

⁹ *Florence Land Min. & Mfg. Co. v. Warren*, 91 Ala. 533, 9 So. 384; *Powers v. Robinson*, 90 Ala. 225, 8 So. 10; *Walden v. Speigner*, 87 Ala. 390, 6 So. 80; *Wilkins v. Wilson*, 51 Cal. 212; *Kent v. Laflin*, 2 Cal. 595; *Shroeder v. Bauer*, 41 Ill. App. 484; *Fitch v. Wetherbee*, 110 Ill. 475; *Schuck v. Gerlech*, 101 Ill. 338; *Grob v. Cushman*, 45 Ill. 119; *Lamb v. Richards*, 43 Ill. 312; *McClain v. Sullivan*, 85 Ind. 174; *Long v. Mellet*, 94 Iowa, 548, 63 N. W. 190; *Albee v. Curtis*, 77 Iowa, 644,

42 N. W. 508; *Hill v. Holliday*, 2 Litt. (Ky.) 332; *White v. Bond*, 16 Mass. 400; *Lottery v. Akers*, 50 Minn. 508, 52 N. W. 922; *Marston v. Williams*, 45 Minn. 116, 22 Am. St. Rep. 719, 47 N. W. 640, 43 Alb. L. J. 130; *Willard v. Finnegan*, 42 Minn. 476, 44 N. W. 985, 8 L.R.A. 50; *Berryhill v. Potter*, 42 Minn. 279, 44 N. W. 251; *Bartleson v. Thompson*, 30 Minn. 161, 14 N. W. 795; *Pamperin v. Scanlan*, 28 Minn. 345, 9 N. W. 868; *Willis v. Jelineck*, 27 Minn. 18, 6 N. W. 373; *Worthington v. Wilmot*, 59 Miss. 608; *Mallalieu v. Wickham*, 42 N. J. Eq. (15 Stew.) 297, 10 Atl. 880; *Bigelow v. Cassedy*, 26 N. J. Eq. (11 C. E. Gr.) 557; *Brainard v. Cooper*, 10 N. Y. 356; *Belden v. Slade*, 26 Hun (N. Y.) 635, 638; *Van Buren v. Olmsted*, 5 Paige Ch. (N. Y.) 9; *Benedict v. Gilman*, 4 Paige Ch. (N. Y.) 58; *Lance v. Gorman*, 136 Pa. St. 200, 20 Am. St. Rep. 914, 20 Atl.

entitle a judgment creditor to redeem from a foreclosure sale

729; *Burden v. Robinson*, 9 Baxt. (Tenn.) 364; *Jackson v. Lawrence*, 117 U. S. 679, 29 L. ed. 1024, 6 Sup. Ct. Rep. 915; *Scripter v. Bartleson*, 43 Fed. 259; *Connecticut Mut. Life Ins. Co. v. Crawford*, 21 Fed. 281; *United States v. Sturges*, 1 Paine C. C. 525; *Stonehewer v. Thompson*, 2 Atk. 440; *Mildred v. Austin*, L. R. 8 Eq. 220; *Neate v. Marlborough*, 3 Myl. & C. 407. *Johns v. Anchors*, 153 Ala. 498, 45 S. 218. See *Shumate as adm'r etc. v. McLendon*, 120 Ga. 396, 48 S. E. 10. *McGraugh v. Deposit Bank of Frankfort*, 147 Ala. 229, 40 So. 984. *Wyman v. Friedman*, 120 Ill. App. 543.

And this is true notwithstanding that the judgment creditor has taken a deed to the property. *People ex rel. Bethmann v. Bowman*, 181 Ill. 421, 72 Am. St. Rep. 265, 55 N. E. 148; *Continental Mutual Life Ins. Co. v. King*, 72 Minn. 287, 75 N. W. 376.

A purchaser at a foreclosure sale may attack the validity of a judgment against the mortgagor in order to prevent an unauthorized redemption by the judgment creditor. *Hughes v. Olson*, 74 Minn. 237, 73 Am. St. Rep. 343, 77 N. W. 42.

A judgment creditor of a mortgagor who has given a deed absolute in form, taking back a separate defeasance, may maintain an action against the mortgagee or the latter's grantees to have his judgment declared a lien upon the equity of redemption of the mortgagor in the mortgaged lands. *Marston v. Williams*, 45 Minn. 116, 22 Am. St. Rep. 719, 47 N. W. 644, 43 Alb. L. J.

130.

Where a foreclosure was irregular through failure to make parties thereto, B, a judgment creditor, who was an incumbrancer subsequent to the mortgage, and S, assignee of the judgment debtor, the court held that B might redeem from the sale; but he would be required to pay the costs of his action unless it was improperly resisted. *Belden v. Slade*, 26 Hun (N. Y.) 635.

In Alabama a judgment creditor of the estate of an insolvent, who has not filed his judgment within nine months after the decree of insolvency, cannot redeem the property from a sale on foreclosure of a mortgage thereon. *Walden v. Speigner*, 87 Ala. 390, 6 So. 80.

A right of redemption exists in the judgment creditor of the grantee who takes a deed from the owner of the equity of redemption after the foreclosure sale and prior to the expiration of the twelve months period. *Ætna Life Ins. Co. v. Beckman*, 210 Ill. 394, 71 N. E. 452.

In Iowa the right of a judgment creditor to redeem from the sale under a senior mortgage is absolutely barred in ten years from the date of his judgment, under Iowa Code, § 2882, and non-residence makes no difference. *Albee v. Curtis*, 77 Iowa, 644, 42 N. W. 508.

In Indiana, under a statute providing that a judgment creditor who redeems "shall maintain a lien on the premises for the amount of money so paid for redemption against the owner and any junior incumbrancer," a junior incumbran-

of the land of his debtor, it is not enough that he is a credit-

cer so redeeming occupies the same priority as to the redemption money that the original judgment creditor occupied. *McClain v. Sullivan*, 85 Ind. 174.

In *Minnesota* where a second mortgagee purchased an assignment of the certificate of sale on the first mortgage, but fulfilled none of the requirements of Minn. Gen. Stat. 1878, c. 81, § 16, which regulates redemption by creditors, the court held that he could not hold the premises as against the holder of a third lien thereon, who had fulfilled all such requirements, and paid the amount for which the premises sold with interest. *Pamperin v. Scanlan*, 28 Minn. 345, 9 N. W. 868.

Any judgment creditor has a right to file a bill against the mortgagor and mortgagee, and redeem the mortgaged property, by paying what is actually due on the mortgage. *Hill v. Holliday*, 2 Litt. (Ky.) 332.

Amount a judgment creditor is bound to pay to redeem mortgaged premises, after a statute foreclosure, is the sum actually due upon the mortgage, and not the sum bid by the purchaser. *Benedict v. Gilman*, 4 Paige Ch. (N. Y.) 58.

Heirs—Judgment against.—One having a judgment lien against one of the heirs of a deceased intestate mortgagor may redeem from the mortgage sale. *Willis v. Jelineck*, 27 Minn. 18, 6 N. W. 373.

From a foreclosure made after the death of the mortgagor, judgment creditors of the heirs of the mortgagor may redeem, the creditor of any particular heir paying that

proportion of the sum for which the land was sold which such heir's interest in the land bears to the whole. *Schuck v. Gerlach*, 101 Ill. 338.

Same — Redeeming part.—The holder of a judgment against the original mortgagor may redeem and subject to his claim three-fifths of the land, after creditors of the mortgagor's heirs have acted similarly with regard to two-fifths thereof, the time limited for such redemption not having expired, and the fact that the execution, of which the redeмпtor was only assignee, was improperly issued in his name, will not invalidate the proceedings. *Schuck v. Gerlach*, 101 Ill. 338.

Homestead—A mere judgment creditor has no lien on a debtor's homestead so as to be entitled to redeem from a purchaser under a foreclosure of a senior mortgage. *Spurgin v. Adamson*, 62 Iowa, 661, 18 N. W. 293.

In United States courts—A judgment creditor may redeem premises from a sale under judgment or decree of a United States court by suing out execution upon his judgment in the ordinary manner, placing his execution in the hands of the proper officer to execute, and paying the money needed to redeem to the clerk of the United States court, together with the commissions of the clerk for receiving and paying the money, but payment of the money into the hands of the sheriff is not sufficient. *Connecticut Mut. Life Ins. Co. v. Crawford*, 21 Fed. 281.

Partnership bonds—Judgment creditors of member of firm may

or,¹⁰ if his lien has been extinguished,¹¹ or does not exist.¹² It is well settled by the decisions that the mere fact that a person occupies the position of a second mortgagee, or subsequent judgment creditor, does not entitle him to redeem the prior mortgage. Unless some special equity exists in the subsequent

not redeem that land conveyed to a partnership in its common or firm name binds only the joint property of the associates, but vests in the several partners as tenants in common, a judgment creditor cannot redeem from a mortgage-foreclosure sale of the lands held by a partnership in its firm name, under Ala. Code 1886, § 2605, providing that a judgment recovered against partners in their common or firm name binds only the joint property of all the associates. *Powers v. Robinson*, 90 Ala. 225, 8 So. 10.

But it is said that a judgment creditor of a member of a firm may, under Alabama Code, 1886, § 1883, redeem lands belonging to his debtor individually from a sale under a mortgage executed by both members of the firm. *Florence Land Min. & Mfg. Co. v. Warren*, 91 Ala. 533, 9 So. 384.

This is permitted where the premises are in hands of heirs or personal representative of the mortgagee on payment of the amount justly due. *Van Buren v. Olmstead*, 5 Paige Ch. (N. Y.) 9.

A judgment cannot be entered declaring the plaintiff to be the owner of land and entitled to redeem land from defendants as mortgagees where the relation of debtor and creditor between the parties has never existed, and there is no obligation of any character secured or to be secured by mort-

gage, since without such an obligation there can be no mortgage. *Schultz v. McLean*, 93 Cal. 329, 25 Pac. 427, 28 Pac. 1053.

After mortgagor has failed to redeem a judgment creditor of a mortgagor who has conveyed his equity of redemption before the foreclosure sale, and has allowed the time for redemption to pass, may redeem from the sale. *Fitch v. Wetherbee*, 110 Ill. 475.

¹⁰ The court of appeals of Illinois has held it is not necessary that a judgment should be a lien against the land to entitle the judgment creditor to redeem. *Shroeder v. Bauer*, 41 Ill. App. 484, aff'd on other grounds in 140 Ill. 135, 29 N. E. 560. This case is not in harmony with the current of authority.

¹¹ The holder of a second judgment subsequent to one under which land is sold loses the right to redeem from a prior foreclosure sale by a sale on execution which cuts off his lien. *Lowry v. Akers*, 50 Minn. 508, 52 N. W. 922.

The owner of a judgment that has ceased to be a lien has no right to redeem from a sale under a mortgage lien which was prior to his judgment. *Long v. Mellet*, 94 Iowa, 548, 63 N. W. 190.

¹² See *Greenwood v. Trigg, Dobbs & Co.* 154 Ala. 487, 46 So. 227.

He must take out an execution first. *Quinn v. Brittain*, 1 Hoffm. Ch. (N. Y.) 353.

incumbrancer, the prior mortgagee has a right to retain his security, and may refuse to surrender it, so long as the mortgagor does not wish to discharge it. If the second incumbrancer is in danger of losing the benefit of his security, unless he is permitted to redeem, and the circumstances are such that equity would subrogate him, upon making these facts known to the first mortgagee, and making him an unconditional tender of his money, he is put upon his inquiry, and, after taking a reasonable time to be advised, his refusal to accept the tender and deliver up his mortgage is at his peril.¹³ A junior judgment creditor can enforce the equity of redemption after a collusive foreclosure to which he was not a party,¹⁴ and upon tendering to the purchaser of land sold under a deed of trust the necessary amount, and offering to give credit upon his judgment, may maintain a bill to redeem from such purchaser.¹⁵

A redemption by a judgment creditor from a mortgage which is good on its face, and at the most is merely voidable at the election of the purchaser at the mortgage sale, cannot be attacked in a suit between him and a vendee of the mortgagor, whose rights have been cut off by the foreclosure.¹⁶ But a judgment creditor who has redeemed from the foreclosure property of his debtor sufficient in value to satisfy his judgment, cannot redeem any other property under his judgment.¹⁷

It has been said by the supreme court of Connecticut, in the case of *Loomis v. Knox*,¹⁸ that the foreclosure of a judgment lien on one of two tracts covered by it, for more than the amount of the entire debt, is a redemption of the other tract, and subrogates the debtor to the right of the judgment

¹³ *Bigelow v. Cassedy*, 26 N. J. Eq. (11 C. E. Gr.) 557.

¹⁴ *Worthington v. Wilmot*, 59 Miss. 608.

¹⁵ *Burton v. Robinson*, 9 Baxter (Tenn.) 364.

¹⁶ *Willard v. Finnegan*, 42 Minn. 476, 44 N. W. 985, 8 L.R.A. 50.

¹⁷ *Scripter v. Bartleson*, 43 Fed. 259.

¹⁸ 60 Conn. 343, 22 Atl. 771.

creditor to redeem a first mortgage on such tract, which has been foreclosed without making the latter a party to the foreclosure proceedings.

§ 1088. Same—From another creditor.—The right of the successive holders of a series of notes, maturing at different times, and secured by the same mortgage, to redeem from a foreclosure and sale in favor of the holder of the note first maturing, is the same as that of separate junior incumbrancers to redeem from a foreclosure of a prior mortgage.¹⁹ But a mortgagee cannot redeem the mortgaged land from one who has himself redeemed it from the purchaser at a sale to foreclose a vendor's lien, under a statute²⁰ permitting one judgment creditor to redeem from another, upon tender or payment of the amount given by the latter, and a stipulated per cent. per annum thereon in addition.²¹

§ 1089. Same—Having lien on land.—A person having a specific lien on land mortgaged to secure the debt of another, is entitled to redeem the land from the lien of such mortgage by paying the amount due thereon.²² Under a statute providing for redemption from foreclosure sale by "creditor having a lien on the land or some part thereof,"²³ a second

¹⁹ *Preston v. Hodgen*, 50 Ill. 56.

²⁰ As Ala. Code, § 1885.

²¹ *Owen v. Kilpatrick*, 96 Ala. 421, 11 So. 476.

²² In *Martin v. Sprague*, 29 Minn. 53, 11 N. W. 143, A owned lots 11 and 12, 12 being a homestead. A and wife mortgaged to B. A foreclosure sale of both lots in one parcel was made in November, 1879. In November, 1880, A's wife paid the purchaser the amount for which the property was sold, and took assignments of the certificate of sale and of the mortgage. In

July, 1879, C recovered judgment against A, which was docketed, and became a lien on the debtor's real estate, except his homestead. Minn. Gen. St. 1878, c. 81, § 16, gives a right of redemption to creditors having a lien "on the real estate or some part thereof." The court held that A's wife did not redeem the property from the mortgage, and that C could redeem both parcels, and, by taking the proper steps, became vested with title to both.

²³ As Minn. Gen. Stat. 1878, c. 81, § 16.

mortgagee is within the meaning of the statute, and so is a person having a lien on an undivided interest therein.²⁴

§ 1090. Same—Of husband on mortgage of wife's property.—A creditor of the husband has no right to redeem from a mortgage by the husband and wife of the wife's land;²⁵ and a creditor of a husband suing to subject to the payment of his debt a building erected by the husband with his own money on his wife's land, has no right to redeem from a mortgage on the land executed by the wife, and is therefore under no duty to offer to redeem.²⁶

§ 1091. Defendant may redeem.—When the mortgagor is the defendant in an action of foreclosure he is entitled to redeem under the general rules already laid down.²⁷ In some of the states, as in Iowa, it is provided by statute that the "defendant" may redeem. Where a statute so provides, the word "defendant" is held to mean that the mortgagor or person holding the legal or possibly an equitable title subject to the mortgage.²⁸

§ 1092. Devisees and legatees.—We have already seen that the assignee of the equity of redemption of the mortgagor may redeem under like circumstances as the mortgagor

²⁴ *Willis v. Jelineck*, 27 Minn. 18, 6 N. W. 373. See also *Scheibel v. Anderson*, 77 Minn. 54, 77 Am. St. Rep. 664, 79 N. W. 594.

²⁵ See *Ware v. Seasongood*, 92 Ala. 152, 9 So. 138; *Ware v. Hamilton*, 92 Ala. 145, 9 So. 136; *Abraham v. Chenoweth*, 9 Oreg. 348. In *Abraham v. Chenoweth*, 9 Oreg. 348, A and B, his wife, mortgaged B's land, and after B's death the mortgage was foreclosed and the land bought by C. The grantee of B's heirs then redeemed the prem-

ises from C, and took possession. In ejectment by A's grantee to recover possession of A's life estate, the court held that he could not recover.

²⁶ *Ware v. Hamilton Brown Shoe Co.* 92 Ala. 145, 9 So. 136; *Ware v. Seasongood*, 92 Ala. 152, 9 So. 138.

²⁷ See *ante*, § 1077. But see *Suttles v. Sewell*, 105 Ga. 129, 31 S. E. 41.

²⁸ *Miller v. Ayres*, 59 Iowa, 424, 13 N. W. 436.

may redeem under like circumstances as the mortgagor himself,²⁹ and where the mortgagor or owner of the equity of redemption has devised his equity of redemption, on his death his devisee may redeem.³⁰ In those cases where a legacy is made a charge on the real estate, it is thought the legatee has such an interest in the land on which the legacy is a charge as will entitle him to redeem.³¹

§ 1093. Grantee in trust deed—May not redeem, when.—In those cases where, in default of the payment of the sum secured by deed of trust, the property is sold and purchased by the *cestui que trust*, it is thought the vendee has no right to redeem without first giving security for the payment of interest to accrue after the sale, and for all damage and waste occasioned or permitted by the party whose property is sold.³²

§ 1094. Grantor of lands mortgaged to secure debt of another.—The court of chancery of New Jersey, in the case of *McKee v. Jordan*,³³ say that a grantor in a deed delivered to an attorney with authority to deliver it to the grantee as security for the loan of a stated sum to her son may redeem upon paying that sum only, where the grantee, although notified by the solicitor of the amount it was intended to secure, accepted it as security for an additional sum previously advanced the son, relying upon the latter's false statement that it was intended by the grantor as security for the total amount. And the supreme court of New York have held that a grantor who has conveyed lands held adversely

²⁹ See *ante*, § 1082.

³⁰ *Denton v. Nanny*, 8 Barb. (N. Y.) 618; *Stokes v. Solomons*, 9 Hare, 75; *Faulker v. Daniel*, 3 Hare, 199; *French v. Newham*, 2 Vern. 216.

³¹ See *Batchelder v. Middleton*, 9 Hare, 75.

³² *Johnson v. Atchison*, 90 Mo. 48, 1 S. W. 751.

³³ 50 N. J. Eq. (5 Dick.) 306, 24 Atl. 398.

to him has no cause of action in his own right to redeem from a mortgage on such lands made by a former owner.³⁴

§ 1095. Grantor in deed absolute in form but mortgage in effect.—Where a deed, absolute in form, is given to secure a debt, the grantor, or those in priority to him, have the same right to redeem that they would have were the instrument a formal mortgage; and this right extends to an assignee of the grantee with notice of the nature of transaction.³⁵ Thus it is said by the supreme court of Nebraska, in the case of *Eiseman v. Gallagher*,³⁶ that the original grantor in a deed which is in fact a mortgage is entitled to redeem from a subsequent purchaser with notice of sufficient facts to put him upon inquiry, on paying the amount of the loan, with interest.

Such a grantor who has received part of the proceeds of a mortgage made by his grantee, can redeem only by paying it as well as his original debt; but if the grantee used the proceeds for himself or to discharge debts of the grantor which he was bound to pay, the grantor is entitled to credit on the original debt for the amount of the second mortgage.³⁷ And where such an instrument has been made without any intent to defraud creditors, the grantor cannot be barred of his right to redeem by the fact that, after making it, he has used it as a shield against creditors by representing that the conveyance is absolute.³⁸

³⁴ *Johnson v. Snell*, 58 Hun (N. Y.) 606, mem. 34 N. Y. S. R. 177, 11 N. Y. Supp. 868.

³⁵ See *Turman v. Bell*, 54 Ark. 273, 26 Am. St. Rep. 35, 15 S. W. 886; *Townsend v. Peterson*, 12 Colo. 491, 21 Pac. 619, 2 Denv. L. N. 185; *Belton v. Avery*, 2 Root (Conn.) 279, 1 Am. Dec. 70; *Daniels v. Alvord*, 2 Root (Conn.) 195; *Eiseman v. Gallagher*, 24 Neb. 79, 37 N. Mortg. Vol. II.—94.

W. 941; *Vanderhaise v. Hughes*, 13 N. J. Eq. (2 Beas.) 410; *Ballard v. Jones*, 6 Humph. (Tenn.) 455; *Still v. Buzzell*, 60 Vt. 478, 12 Atl. 209.

³⁶ 24 Neb. 79, 37 N. W. 941.

³⁷ *Turman v. Bell*, 54 Ark. 273, 26 Am. St. Rep. 35, 15 S. W. 886.

³⁸ *Townsend v. Peterson*, 12 Colo. 491, 21 Pac. 619, 2 Denv. Legal News, 185.

§ 1096. **Grantor in deed of trust.**—A deed of trust is in nature and effect similar to a mortgage in that it is given to secure the payment of a debt, and on payment in accordance with the terms the grantor is entitled to have the lien discharged. A grantor in a deed of trust, like a grantor in an ordinary mortgage, who, on the maturity of the debt secured thereby, tenders the amount due may, upon refusal of the tender, maintain a bill to redeem.³⁹ But it is said in *Van Meter v. Darrah*,⁴⁰ that under the Missouri statute,⁴¹ a grantor in a deed of trust, to avail himself of the right to redeem from a sale under the power conferred thereby must give security, as required by that statute,⁴² within a reasonable time after sale; and that four months after a sale made when the grantor was temporarily insane and confined in an asylum and three and a half months after his restoration and actual notice to him of the sale, is not such reasonable time as the statute contemplates.

The court of appeals of Colorado, in the case of *McMeel v. O'Connor*,⁴³ say that the grantor in a trust deed which was void because the parties were reversed—the property being conveyed to the beneficiary instead of the trustee—has the right to pay off the debt secured thereby, and to receive a release of the property conveyed, clear of a cloud cast upon it by a pretended sale and deed executed by the trustee named in the trust deed.

§ 1097. **Guardians may redeem.**—In those cases where a mortgage is given to the special guardian of an infant for the benefit of the latter, the special guardian is the proper person to file a bill for redemption and assignment⁴⁴ of a senior mortgage⁴⁵ because he is a person who has a right

³⁹ *Willem v. Dunn*, 93 Ill. 511.

⁴⁰ 115 Mo. 153, 22 S. W. 30.

⁴¹ Mo. Rev. Stat. 1879, § 3298.

⁴² Mo. Rev. Stat. 1879, § 3299.

⁴³ 3 Colo. App. 113, 32 Pac. 182.

⁴⁴ See *ante*, § 1035.

⁴⁵ *Pardee v. Van Auken*, 3 Barb. (N. Y.) 534. See *Marvin v. Schilling*, 12 Mich. 356

to, interest in or lien upon the lands embraced in the mortgage.⁴⁶

§ 1098. Heirs of deceased mortgagor may redeem.—

Where a mortgagor, owner of the equity of redemption, dies having devised his right of redemption, his devisee may redeem,⁴⁷ but if he dies without having either assigned or devised this equity, it descends to and becomes vested in his heirs,⁴⁸ and is not barred by a sale of the land, under a decree of foreclosure, in an action in which the administrator of such deceased mortgagor is the defendant, and the heirs are not joined.⁴⁹ The supreme court of Illinois, in the case of *Hunter v. Dennis*,⁵⁰ say that, when the mortgagor's widow pays the debt and takes a deed herself, the mortgagor's heirs may redeem from her.

§ 1099. Holder of legal estate may redeem.—

It was settled as early as the case of *Lomax v. Bird*,⁵¹ decided in 1683, that no one can redeem from the lien of the mortgage who cannot show a title in the equity of redemption.⁵² In deciding the case of *James v. Bion*,⁵³ in 1818, Lord Eldon said: "It is extremely clear that a mortgagee may retain possession of the estate until he is paid, and that no one has a right to make a tender of the money due except the party entitled to the equity of redemption; against all other persons the estate is the property of the mortgagee. In *Grant v.*

⁴⁶ *Belden v. Slade*, 26 Hun (N. Y.) 635, 641.

⁴⁷ See *ante*, § 1092.

⁴⁸ *Brown v. Stark*, 12 Wis. 572, 78 Am. Dec. 762. See *Butts v. Broughton*, 72 Ala. 294; *Sheldon v. Bird*, 2 Root (Conn.) 509; *Hunter v. Dennis*, 112 Ill. 568; *Storr v. Bounds*, 1 Ohio St. 107, 109; *Zagel v. Kuster*, 51 Wis. 31, 7 N. W. 781; *Chew v. Hyman*, 10 Biss. C. C. 240; *Lloyd*

v. Waite, 1 Phil. 61; *Pym v. Bowerman*, 3 Swan. 241; *Rainey v. McQueen*, 121 Ala. 191, 25 So. 920; *Francis v. Sheats*, 153 Ala. 468, 127 Am. St. Rep. 61, 45 So. 241.

⁴⁹ *Stark v. Brown*, 12 Miss. 572, 78 Am. Dec. 762.

⁵⁰ 112 Ill. 568.

⁵¹ 1 Vern. 182.

⁵² See *ante*, § 1077; *post*, § 1121.

⁵³ 3 Swanst. 237.

Duane,⁵⁴ the court held that no person can come into a court of equity for a redemption of a mortgage except he who is entitled to the legal estate of the mortgagor, or claims a subsisting interest therein under him. If the applicant shows no interest in himself, or a right to redeem the mortgage on his own account, or on account of others, with whom some connection is shown and whose interest he has a right to represent, his claims cannot be supported, notwithstanding some other person might have a right to enforce the same claim. A mere volunteer cannot be allowed to speculate on the claims of others, and redeem at their peril, and then litigate with those who may have the right.”⁵⁵

On the other hand, it is equally well settled that any person who holds a legal estate in the mortgaged premises, or any part thereof,⁵⁶ where derived through or in privity with the mortgagor, or holding a legal or equitable lien on the mortgaged premises, or any part thereof,⁵⁷ may redeem.

§ 1100. Holder of interest in mortgaged premises.—The general rule in this country is that anyone who has an interest in the mortgaged lands, in privity with the mortgagor, and who would suffer loss by foreclosure, may redeem from the lien of the mortgagor.⁵⁸ But, it has been said that the holder of a tax title has no right to redeem lands, embraced in his deed, from a mortgage thereon held in trust or a minor.⁵⁹ And a party who furnishes material for the building of a house, but does not follow the directions of the mechanics' lien law, has no lien on the premises entitling him to redeem a mortgage made thereon, nor does he acquire any

⁵⁴ 9 John. (N. Y.) 611.

⁵⁵ See *post*, § 1121.

⁵⁶ See *post*, § 1102.

⁵⁷ See *ante*, § 1085 *et seq.*

⁵⁸ *Smith v. Austin*, 9 Mich. 475.
See *Scott v. Henry*, 13 Ark. 112;
Farnum v. Metcalf, 62 Mass. (8
Cush.) 46; *Platt v. Squire*, 53 Mass.

(12 Met.) 494; *Millard v. Truax*,
50 Mich. 343, 15 N. W. 501; *Boquet*
v. Coburn, 27 Barb. (N. Y.) 230;
Pearce v. Morris, L. R. 5 Ch. App.
227.

⁵⁹ *Witt v. Mewhirter*, 57 Iowa,
545, 10 N. W. 890.

interest in the premises by reason of his recovery of judgment against the mortgagor after foreclosure and sale.⁶⁰

But to entitle such person to redeem his interest must be derived, either mediately or immediately, from or through, or in the right of the mortgagor, and in fact constitute a part of the mortgagor's original right of redemption.⁶¹

§ 1101. Holder of easement in mortgaged premises.—

It is said by the supreme judicial court of Massachusetts, in the case of *Bacon v. Bowdoin*,⁶² that a person having an easement only in the land under mortgage, may redeem.

§ 1102. Holder of a part of mortgaged premises.—

The holder of a portion of mortgaged premises, not made a party to a mortgage foreclosure proceeding, is entitled to redeem from the sale made thereunder.⁶³ The supreme court of the United States, in the case of *Villa v. Rodriguez*,⁶⁴ say that one who holds a portion of the title by deed from a part of the mortgagors is clothed with their rights, and is entitled to redeem such portion upon paying a proper proportion of the mortgage debt and interest; but the weight of decision,

⁶⁰ *Eaton v. Bender*, 1 Neb. 426.

⁶¹ *Smith v. Austin*, 9 Mich. 475.

See *Millard v. Truax*, 50 Mich. 343, 15 N. W. 501.

⁶² 39 Mass. (22 Pick.) 401.

⁶³ *Green v. Dixon*, 9 Wis. 532; *Rothschild v. Bay City Lumber Co.* 139 Ala. 571, 36 So. 785. See *Lowrey v. Byers*, 80 Ind. 443; *Boquet v. Coburn*, 27 Barb. (N. Y.) 230; *Re Willard*, 5 Wend. (N. Y.) 94; *Pearce v. Morris*, L. R. 8 Eq. 217. See also *Mercer v. McPherson*, 70 Kan. 617, 79 Pac. 118.

In the case of *Lowrey v. Byers*, 80 Ind. 443, A and B bought land, giving their joint notes and mortgage for the purchase-money, and agreed that each should pay one

half of such money, and own one undivided half of the land. A paid his half. The holder of the last note, still unpaid, had the land sold to satisfy his judgment. C, the holder of a judgment against B, which was a junior lien on the land, redeemed the land from the sale. The court held that A might redeem from C.

One who acquires an estate in part of the mortgaged premises may redeem before foreclosure of the mortgage. *Howser v. Cruikshank*, 122 Ala. 256, 82 Am. St. Rep. 76, 25 So. 206.

⁶⁴ 79 U. S. (12 Wall.) 323; sub nom. *Alexander v. Rodriguez*, 20 L. ed. 406.

and the better doctrine, is thought to be that the owner of a portion of the mortgaged premises cannot redeem without paying the whole mortgage debt.⁶⁵ It is thought that the mortgagee is not obliged to accept a tender of the amount due on the mortgage from one who holds but a moiety of the equity of redemption, and when there is a dispute as to the title to the equity, in redemption and discharge of the whole mortgage.⁶⁶ In those cases where one of several owners redeems the mortgaged premises he thereby becomes substituted, in equity, in the place of the mortgagee, and is entitled to hold the land as if the mortgage existed, until the other owners repay to him their shares of the incumbrance; he in effect becomes the assignee of the mortgagee, for the purpose of enabling him to obtain the whole title to the land, if the other owners decline to contribute their respective shares towards the removal of the incumbrance.⁶⁷

§ 1103. Holder of bond to convey cannot redeem.—

It is said by the supreme judicial court of Massachusetts, in the case of *McDougald v. Capron*,⁶⁸ that a bond for the conveyance of land upon the performance of certain conditions does not give the obligee a sufficient title to enable him to maintain a bill in equity against a mortgagee for the redemption of a prior mortgage thereon. It is otherwise, however, where a person is in possession of land under a contract to purchase. Chancellor Walworth, in the case of

⁶⁵ *Street v. Beal*, 16 Iowa, 68, 85 Am. Dec. 504; *Rowell v. Jewett*, 73 Me. 365; *Johnson v. Candage*, 31 Me. 28; *Smith v. Kelly*, 27 Me. 237, 46 Am. Dec. 595; *Osibson v. Crehore*, 22 Mass. (5 Pick.) 146; *Taylor v. Porter*, 7 Mass. 355; *Lowrey v. Byers*, 80 Ired. (N. C.) 443; *Hubbard v. Ascutney Mill Dam. Co.* 20 Vt. 402, 50 Am. Dec. 41.

⁶⁶ *Rowell v. Jewett*, 73 Me. 365.

Interest does not stop at the date

of the tender when refused under such circumstances. Nor will interest stop when it appears that the person making the tender had the use and benefit of the money tendered from and after the time when it was made. *Rowell v. Jewett*, 73 Me. 365.

⁶⁷ *Howard v. Ascutney Mill Dam Co.* 20 Vt. 402, 50 Am. Dec. 41.

⁶⁸ 73 Mass. (7 Gray) 278.

Lowry v. Tew,⁶⁹ says: "It is true a party who has gone into possession of premises under an agreement to purchase the same is, at law, a tenant at will to the holder of the legal right. But if he is under a written agreement, made by the owner, to sell and convey the premises to him, or under a parol agreement which has been so far consummated as to entitle him to a specific performance, he is in equity considered as the owner of that title for which he contracted, and which the vendor is to give him. And if, that is an equity of redemption he has the same claim to redeem, except as to *bonæ fide* purchasers without notice of his equitable rights, as if the equity of redemption had been conveyed to him at the time his equitable rights accrued to him under the contract."

§ 1104. Married woman mortgaging own property for husband's debt.—In those cases where a married woman gives a deed of her property, absolute in form, to secure the debt of her husband, the grantee giving back a bond for conveyance to the husband, upon the husband's failure to pay the debt or redeem, the wife may redeem.⁷⁰

§ 1105. Mortgagee—junior may redeem.—A junior mortgagee or other junior lienor, has a right to redeem from a prior lien,⁷¹ even though the decree for the foreclosure of

⁶⁹ 3 Barb. Ch. (N. Y.) 407, 414.

⁷⁰ Brighton v. Doyle, 64 Vt. 616, 25 Atl. 694.

⁷¹ Fink v. Murphy, 21 Cal. 108, 81 Am. Dec. 149; Naylor v. Colville, 20 App. Div. 581, 47 N. Y. Supp. 267; American Loan & Trust Co. v. Atlanta Electric Ry. Co. 99 Fed. 313; Jones v. Dutch, 3 Neb. (Unof.) 673, 92 N. W. 735.

See Wiley v. Ewing, 47 Ala. 418; Black v. Gerichten, 58 Cal. 56; Horn v. Jones, 28 Cal. 194; Tuolumne Redemption Company v. Sedgwick,

15 Cal. 516 Gamble v. Voll, 15 Cal. 507; Kirkham v. Dupont, 14 Cal. 559; Bridgeport Savings Bank v. Eldredge, 28 Conn. 556, 73 Am. Dec. 688; Harrison v. Wise, 21 Conn. 1, 63 Am. Dec. 151; Whitehead v. Hall, 148 Ill. 253, 35 N. E. 871; Rogers v. Herron, 92 Ill. 583; Morse v. Smith, 83 Ill. 396; Hodgen v. Guttery, 58 Ill. 431; Catterlin v. Armstrong, 79 Ind. 514; Hosford v. Johnson, 74 Ind. 479; Hasselman v. McKernan, 50 Ind. 441; Skinner v. Young, 80 Iowa, 234, 45 N. W.

such prior lien ascertains the amount and directs the payment

889; *Smith v. Shay*, 62 Iowa, 119, 17 N. W. 444; *Tuttle v. Dewey*, 44 Iowa, 306; *McHenry v. Cooper*, 27 Iowa, 137; *Anson v. Anson*, 20 Iowa, 55, 89 Am. Dec. 514; *Knowles v. Rablin*, 20 Iowa, 101; *Street v. Beal*, 16 Iowa, 68, 85 Am. Dec. 504; *White v. Hampton*, 13 Iowa, 259; *Heimstreet v. Winney*, 10 Iowa, 430; *Cooper v. Martin*, 1 Dana (Ky.) 24; *Pritchard v. Kallamazoo College*, 82 Mich. 587, 47 N. W. 31; *Case Threshing Machine Co. v. Mitchell*, 74 Mich. 679, 42 N. W. 151; *Lamb v. Jeffrey*, 41 Mich. 719, 3 N. W. 204; *Gatz v. Toles*, 40 Mich. 725; *Sager v. Tupper*, 35 Mich. 134; *Avery v. Ryerson*, 34 Mich. 362; *Bovey De Laittre Lumber Co. v. Tucker*, 48 Minn. 223, 50 N. W. 1038; *Tinkcom v. Lewis*, 21 Minn. 132; *Wilson v. Vanstone*, 112 Mo. 315, 20 S. W. 612; *Reynard v. Brown*, 7 Neb. 449; *Lambertville National Bank v. McCready Bag & Paper Co.* (N. J. Ch.) 15 Atl. 388, 1 L.R.A. 334; *Hill v. White*, 1 N. J. Eq. (1 Saxt.) 435; *Benton v. Hatch*, 122 N. Y. 329, 25 N. E. 486; *Clark v. Mackin*, 95 N. Y. 351; *Tombly v. Cassidy*, 82 N. Y. 155; *Frost v. Yonkers Savings Bank*, 70 N. Y. 553, 26 Am. Rep. 627; *Pardee v. McAuken*, 3 Barb. (N. Y.) 534; *Jenkins v. Continental Insurance Co.* 12 How. (N. Y.) Pr. 66; *Denton v. Ontario County National Bank*, 18 N. Y. Supp. 35, 44 N. Y. S. R. 33; *Dings v. Parshall*, 7 Hun. (N. Y.) 522; *Bloomingdale v. Barnard*, 14 N. Y. Supr. 460; *Campbell v. McElevy*,

2 Disn. (Ohio) 574; *Hovenden v. Knott*, 12 Oreg. 267, 7 Pac. 30; *Chavener v. Wood*, 2 Oreg. 182; *Maloney v. Earheart*, 81 Tex. 281, 16 S. W. 1030; *Walker v. King*, 44 Vt. 601; *Downer v. Wilson*, 33 Vt. 1; *Farwell v. Murphy*, 2 Wis. 533; *Lauriat v. Stratton*, 6 Sawy. C. C. 339; *Flynt v. Howard*, (1893) 2 Ch. 54; *Smith v. Green*, 1 Coll. 550; *Ramsbottom v. Wallis*, 5 L. J. N. S. Ch. 92; *Palk v. Clinton*, 12 Ves. 59, 8 Rev. 283; *Wemple v. Yosemite Gold Mining Co.* 87 Pac. 280 (Cal. App.); *Bristol v. Hershey*, 95 Pac. 1040 (Cal. App.); *Darelius v. Davis*, 74 Minn. 345, 77 N. W. 214; *Long v. Richards*, 170 Mass. 120, 64 Am. St. Rep. 281, 48 N. E. 1083. See also *Horr v. Herrington*, 22 Okla. 590, 20 L.R.A.(N.S.) 47, 98 Pac. 443.

In *Alabama, Code 1886, § 1879*, the right of redemption is confined to the persons upon whom it is expressly conferred. Junior mortgagees and assignees not being mentioned cannot redeem. *Commercial Real Estate & B. Association v. Parker*, 84 Ala. 298, 4 So. 268; *Aiken v. Bradford*, 84 Ala. 395, 4 So. 266; *Powers v. Andrews*, 84 Ala. 289, overruling *Bailey v. Timberlake*, 74 Ala. 221.

In the case of *Powers v. Andrews*, *supra*, the court say: "The statutory right of redemption, on the contrary, comes into existence only after the equity of redemption proper has been cut off by sale or foreclosure. Until then, it would seem, it cannot spring into life.

of the junior lien out of any surplus proceeds of the sale re-

And we have uniformly decided that this privilege is neither property, nor the right of property; that it is not subject to levy or sale as such under execution; and that it is a right or privilege personal to the debtor. *Parmer v. Parmer*, 74 Ala. 285; *Otis v. McMillan*, 70 Ala. 46, 62; *Childress v. Monette*, 54 Ala. 317; *Mewburn v. Bass*, 82 Ala. 626, 2 So. 520; *Cooper v. Hornsby*, 71 Ala. 62; *Seals v. Pfeiffer*, 77 Ala. 278. It necessarily follows from these principles, which are now too well settled to be disturbed, that the statutory right of redemption can only be exercised by persons named in the statute, in the mode, within the time, and upon the conditions therein prescribed, although in construing the statute it must be interpreted liberally in favor of the debtor, to prevent the oppressive sacrifice of his estate. The statute itself provides, in detail and very fully, for the mode in which the right may be exercised, and the circumstances which authorize it, and the remedy for enforcing it. The right is conferred only on the following named classes of persons: (1) The debtor himself; (2) any judgment creditor of the debtor whose judgment has not been obtained by fraud, collusion or confession; (3) the executor or administrator of the debtor; (4) the heirs or devisees of the debtor; (5) the executor or administrator of any judgment creditor of the debtor; (6) a child who was the grantee of his parent, who owned the land sold. Code 1886, §§ 1879, 1883, 1887, 1891."

In the case of *Wiley v. Ewing*, 47 Ala. 418, it is said that where a debtor executes two or more

mortgages on the same tract of land at different times to different persons, and for security for different debts, the junior mortgagee has a right to redeem from the senior mortgagee by paying his debt with interests and costs. This right is held to be independent of the statutory right given to judgment creditors; it applies generally to deed of trust to secure the payment of debts and to mortgages proper.

In *California* a junior mortgagee who is not made a party to a suit for foreclosure of a prior mortgage, has a statutory right of redemption within six months from the date of the sale made under the decree in such suit; and has also the general equitable right of redemption which exists independently of the statute. If made a party to the foreclosure suit, his equitable right of redemption is barred, but he redeems under the statute. See *Black v. Gerichten*, 58 Cal. 56; *Horn v. Jones*, 28 Cal. 194; *Fink v. Murphy*, 21 Cal. 108, 81 Am. Dec. 149; *Tuolumne Redemption Co. v. Sedgwick*, 15 Cal. 516; *Gamble v. Voll*, 15 Cal. 507; *Kirkham v. Dupont*, 14 Cal. 559; *San Jose Water Co. v. Lyndon, as sheriff, etc.* 124 Cal. 518, 57 Pac. 481. See also *White v. Costigan*, 134 Cal. 33, 66 Pac. 78.

In *Connecticut* when second mortgagee applies to redeem prior mortgage, he stands in the same situation as the mortgagor, and is entitled to the benefit of all payments made by him, and of all rents received by the prior mortgagee, and is not bound to pay any greater sum than the mortgagor would have had to pay if the application had been made by him.

maintaining after satisfaction of the prior lien, for his statutory

Harrison v. Wyse, 24 Conn. 1, 63 Am. Dec. 151.

In those cases where second mortgagees have acquired by foreclosure the right to redeem mortgaged premises have such right after the time allowed for redemption has expired, notwithstanding a decree of foreclosure obtained without service of process or legal notice to them, by the defendants, who by purchase represents the interests of the first mortgage. *Bank v. Eldredge*, 28 Conn. 558, 73 Am. Dec. 688.

In *Illinois*, a junior mortgagee may redeem from the first mortgage, and have the property sold on foreclosure, without regard to a conveyance of the mortgagor's equity of redemption, made to the first mortgagee, after the execution of the junior mortgage. *Rogers v. Herron*, 92 Ill. 583.

In those cases where there has been a foreclosure proceeding by the prior mortgagee, and the subsequent mortgagee has not been served with process, he is entitled to redeem from the sale foreclosing the first mortgage, and the purchaser under such a sale takes the premises subject to the junior mortgagee's right of redemption. See *Morse v. Smith*, 83 Ill. 396; *Hodgen v. Guttery*, 58 Ill. 431.

It is held, in the recent case of *Whithead v. Hall*, 148 Ill. 253, 35 N. E. 871, that a junior mortgagee of an equity of redemption is not deprived of the right to redeem within fifteen months as a "decree creditor" under Ill. Rev. Stat. c. 77, § 20, by the fact that he is a party to the foreclosure of the senior mortgage, and was, by the decree, allowed to redeem within

twelve months, as such decree applies to his right to redeem solely as a junior mortgagee, and not as a decree creditor. See also *Illinois National Bank v. Trustees of Schools*, 111 Ill. App. 189.

In *Indiana*, where a mortgage has been foreclosed by the senior mortgagee, without making the junior mortgagee a party to the foreclosure suit, and the latter brings a bill against the purchaser to redeem, he is required to pay the amount of the first mortgage, and attorney's fees when provided for therein, and also amounts paid for insurance by the senior mortgagee on neglect of the mortgagor to keep the premises insured as required by the mortgage, but he is not bound to pay the costs of the foreclosure suit. *Hosford v. Johnson*, 74 Ind. 479.

In those cases where the holder of a junior mortgage has foreclosed his mortgage without making the senior mortgagee a party to the suit, and who has bought in the premises on sale under the decree, has a right to redeem the mortgaged premises from the senior mortgagee, though the senior mortgagee may have foreclosed his mortgage previously, without making the holder of the junior mortgage a party to the suit, even though the premises have been sold by the sheriff on the decree and bought in by the senior mortgagee. See *Catterlin v. Armstrong*, 79 Ind. 514; *Hasselman v. McKernan*, 50 Ind. 441.

In *Iowa*, the holder of a junior mortgage, who is made defendant in a suit for the foreclosure of the senior mortgage, can redeem, after sale, by paying the amount bid, with interest, within the time allowed by

right to redeem is not thereby destroyed, but still exists as to

statute, notwithstanding the amount bid by the senior mortgagee at the sale is less than the amount of the mortgage debt. *Tuttle v. Dewey*, 44 Iowa, 306.

The rule that a junior mortgagee, not made party to foreclosure proceedings of a senior mortgagee, who has both actual and constructive notice of the rights of the former, may foreclose against the mortgagor, or redeem from the first mortgagee or his assignee or the purchaser at the foreclosure sale, is not changed by statute in Iowa. *Anson v. Anson*, 20 Iowa, 55, 89 Am. Dec. 514.

But where such junior mortgagee seeks to redeem a portion of the property sold on the foreclosure of the senior mortgagee, he must tender the amount of the entire mortgage debt. See *Knowles v. Rabbin*, 20 Iowa, 101; *Smith v. Shay*, 62 Iowa, 119, 17 N. W. 444; *Street v. Beal*, 16 Iowa, 68, 85 Am. Dec. 504; *White v. Hampton*, 13 Iowa, 259; *Heimstreet v. Winnie*, 10 Iowa, 430.

Same—After his debt has been fully satisfied, a junior mortgagee has no right to redeem from a prior sale under foreclosure of a senior mortgage to which he was not a party. *McHenry v. Cooper*, 27 Iowa, 137.

In *Kentucky*, a junior mortgagee or incumbrancer, or the holder of the equity of redemption, not made a party to the foreclosure proceedings, is not barred by the decree, and will be allowed to redeem the estate, even though the senior mortgagee had no notice of such claim. But if he is made a party to the action, and fails to defend, he will be barred. *Cooper v. Martin*, 1 Dana (Ky.) 24.

In *Michigan*, the subsequent mortgagee of a portion of the premises included in the first mortgage, the other portion of which has been conveyed, may be permitted to redeem from the first mortgage, and be subrogated to all rights therein. *J. I. Case Threshing Mach. Co. v. Mitchell*, 74 Mich. 679, 42 N. W. 151.

It is said, in *Pritchard v. Kalamazoo College*, 82 Mich. 587, 47 N. W. 31, that an assignee of a recorded second mortgage, although failing to record his assignment until after the first mortgagee, without actual knowledge of the assignment and on the faith of the record and the representation of the second mortgagee, to whom, subsequent to the assignment, the mortgagor conveyed the land, that his mortgage had been extinguished by merger, released his first mortgage and took a third mortgage on the land for the unpaid principal and interest due on the first,—is, where he records his assignment before commencement of proceedings to foreclose the third mortgage, to which he is not made a party, entitled to redeem.

Same—A second mortgagee has a right to redeem a prior mortgage, and this right cannot be cut off or prejudiced by arrangements between the holder of the first mortgage and the mortgagor, for an extension of time to pay it. *Lamb v. Jeffrey*, 41 Mich. 719, 3 N. W. 204; *Sager v. Tupper*, 35 Mich. 134.

Such mortgagee's right cannot be affected by a foreclosure decree and sale under the prior mortgage, where, at the time of such decree and sale, no party to the foreclosure suit in any way represented, or

any portion of his demand not satisfied by the application of

had any right or interest in, such subsequent mortgage. *Avery v. Ryerson*, 34 Mich. 362.

But his right to redeem is barred if he allows the foreclosure to become absolute. *Gantz v. Toles*, 40 Mich. 725.

In *Minnesota* it is said that when, upon foreclosure by advertisement of a mortgage embracing two parcels of land, such parcels have been separately sold to the mortgagee, at a separate price for each, a junior mortgagee of one of the parcels can redeem from the sale that parcel only which is embraced in his mortgage. The rule is the same when such junior mortgagee has foreclosed his mortgage by advertisement, and has purchased, at the foreclosure sale, the parcel embraced in his mortgage. *Tinkcom v. Lewis*, 21 Minn. 132.

In *Missouri* the right of the holder of a junior mortgage to redeem before the foreclosure of a senior mortgage is not affected where the mortgagee in the senior mortgage purchases the equity of redemption. *Wilson v. Vanstone*, 112 Mo. 315, 20 S. W. 612.

In *Nebraska* it is held that the right of a junior incumbrancer who was not made a party to a suit to foreclose a mortgage is to redeem the senior incumbrancer, not to redeem the land. The owner of the fee redeems the land itself. The junior incumbrancer is not entitled to the estate, but to an assignment of the securities. *Renard v. Brown*, 7 Neb. 449.

In *New Jersey* any subsequent mortgagee may redeem a first mortgage and bring all the land to a sale under the same decree, and thus enable the court to marshal

the fund, and hence cannot require an intermediate mortgagee to take any particular step toward so doing. *Lambertville Nat. Bank v. McCready Bag & Paper Co.* (N. J. Ch.) 15 Atl. 388, 1 L.R.A. 334.

In *Hill v. White*, 1 N. J. Eq. (1 Saxt.) 435, where the first mortgagee purchased the mortgaged premises at a sheriff's sale, took possession and received the rents and profits, the second mortgagee was allowed to redeem, upon paying the principal and interest of the first mortgage, together with the costs incurred in obtaining possession, and deducting therefrom what with reasonable diligence, might have been received by the first mortgagee while in possession of rents and profits.

In *New York* a junior mortgagee may, either by payment or tender of the amount due, redeem premises from the lien of a senior mortgage. *Dings v. Parshall*, 7 Hun. (N. Y.) 522. See *Bloomington v. Barnard*, 14 N. Y. 460. In those cases where a junior mortgagee who has not been made a party to the foreclosure of a prior mortgage is entitled in redeeming therefrom to all the rights which he might have asserted in the foreclosure suit had he been made a party. *Denton v. Ontario County Nat. Bank*, 44 N. Y. S. R. 33, 18 N. Y. Supp. 38.

In *Oregon* the code provides that subsequent incumbrancers must be made parties thereto, and that the decree therein shall ascertain and determine the amount and priority of the liens of all such parties, and direct that the premises be sold and the proceeds applied to the satisfaction of the debts secured there-

such surplus proceeds.⁷² But in Indiana it is held that a junior

by in the order specified therein; and that process to enforce such decree should issue upon the joint application of the parties or the order of the court. The court held that a sale in pursuance of such decree was a sale upon the process of each of the lien creditors provided for in the decree, that it extinguished their liens, and that therefore neither of them had a right to redeem the premises from the purchaser at such sale under § 297 of the Code, which gives the right of redemption only to a creditor having a lien upon the property sold. *Lauriat v. Stratton*, 6 Sawy. C. C. 339.

Same—Such subsequent incumbrancers must be made parties, and that the decree in a suit to enforce the lien shall ascertain the amount and privity of the liens of all such parties, and direct that the premises be sold and the proceeds applied to the satisfaction of the debts secured thereby in the order specified therein. *Hovenden v. Knott*, 12 Oreg. 267, 7 Pac. 30; *Chavener v. Wood*, 2 Oreg. 182; *Lauriat v. Stratton*, 6 Sawy. C. C. 339, Oreg. Civ. Code, §§ 410, 414.

In *Texas*, under *Rev. Stat. art. 2980*, invalidating the whole rate of interest on a usurious contract, a junior mortgagee or a purchaser under the mortgage may redeem from a prior usurious incumbrance by paying only so much of the debt as is recognized by law. *Maloney v. Earheart*, 81 Tex. 280, 16 S. W. 1030.

In *Vermont* a subsequent mortgagee permitting the grantor of the mortgage to remain in possession,

has no greater claim than he would have had if the mortgagor had remained in possession, and must stand upon his rights under his own mortgage. *Walker v. King*, 44 Vt. 601; *Downer v. Wilson*, 33 Vt. 1.

In *Wisconsin* it is held that the assignee of a second mortgage may maintain a bill for redemption against the assignee of a first mortgage, or he may, in a bill of foreclosure, make the assignee of the first mortgage a party and obtain the usual decree of redemption against him. *Farwell v. Murphy*, 2 Wis. 533.

In *England* second mortgagee of real estate and a reversionary interest in personalty as security for a debt, and takes a third mortgage of the real estate only for another debt, and transfers the latter mortgage to the holder of a first mortgage on both the real estate and personalty, and at the same time releases the real estate from the second mortgage, is entitled to redeem both the personalty and real estate on payment of the sum secured by the first mortgage, to be apportioned between the real estate and the personalty according to their respective values, and is entitled to have a conveyance of the personalty absolutely, and of the real estate to be held as security for such part of the money paid as shall be apportioned to it. *Flint v. Howard* (C. A.) (1893) 2 Ch. 54.

See *Smith v. Green*, 1 Coll. 555; *Ramsbottom v. Wallis*, 5 L. J. N. S. Ch. 92; *Palk v. Clinton*, 12 Ves. 59, 8 Rev. 283.

⁷² *Frink v. Murphy*, 21 Cal. 108, 81 Am. Dec. 149.

mortgagee who is made defendant in a suit to foreclose the senior mortgage, and whose lien is provided for in the decree which directs a sale of the property and a distribution of the proceeds among all the lien-holders in the order of priority, cannot redeem from the sale under statutes which do not permit a judgment creditor to redeem from his own sale.⁷³

The fact that the junior mortgagee gives only a nominal consideration,⁷⁴ or no consideration at all,⁷⁵ does not affect the junior mortgagee's right to redeem. And it is said by the supreme court of Illinois, in the case of *Morse v. Smith*,⁷⁶ that a mortgagee of several tracts of land, a portion of which are subject to a prior mortgage, has a right to redeem from a sale under such prior mortgage, without showing that it is necessary to protect the security of his mortgage debt, and that the other tracts in his mortgage are not of sufficient value to pay his mortgage debt. The reason for this rule is the fact that the mortgagee is under no obligation to take any risk as to the adequacy of his security. In the case of *Campbell v. MsElvey*⁷⁷ it is said that a mortgagee of a leasehold will be permitted to redeem the premises from forfeiture, and the sum he pays in such case will be a preferable charge, in redemption account, against the lessee and all claiming under him.

The supreme court of Alabama, in the case of *Owen v. Kilpatrick*,⁷⁸ say that a mortgagee cannot redeem the mortgaged

⁷³ *Horn v. Indianapolis Nat. Bank*, 125 Ind. 381, 25 N. E. 558, 9 L.R.A. 676, 21 Am. St. Rep. 231.

⁷⁴ In the case of *Bovey De Laitre Lumber Co. v. Tucker*, 48 Minn. 223, 50 N. W. 1038, the mortgagee in a mortgage for \$2 made by the owner of lands sold under a prior mortgage, on the last day for redemption by him, acquires the right to file notice and redeem from the sale.

⁷⁵ In *Skinner v. Young*, 80 Iowa, 234, 45 N. W. 889, it is said that

a mortgagee who gave no consideration for the mortgage, and who assigned it as security for a debt of the mortgagor to the assignee, has no interest which will authorize a redemption of property of the mortgagor sold under another mortgage, unless by reason of payments made to the holder of the mortgage which had been assigned.

⁷⁶ 83 Ill. 396.

⁷⁷ 2 Disn. (Ohio) 574.

⁷⁸ 96 Ala. 421, 11 So. 476.

land from one who has himself redeemed it from the purchaser at a sale to foreclose a vendor's lien, under the statute of that state⁷⁹ permitting one judgment creditor to redeem from another upon tender or payment of the amount given by the latter, and ten per cent. per annum interest thereon. And it is said in the case of *Whipperman v. Dunn*,⁸⁰ that a mortgagee who assigns all his interest in the certificate of purchase of the mortgaged premises at a sale under foreclosure is thereby divested of all title to the debts secured or intended to be secured by the mortgage; and he cannot thereafter maintain an action to reform the mortgage.

§ 1106. **Same—Senior may not redeem.**—A senior mortgagee, even though he has barred all other interests by a foreclosure, is not entitled to redeem the mortgaged premises from a purchaser under foreclosure of a junior mortgage, but he may take out a precept and sell the land to satisfy his decree, regardless of the previous sale.⁸¹

§ 1107. **Mortgagor may redeem.**—The mortgagor has the paramount and absolute right to redeem the mortgaged premises from the mortgage at any time before the sale thereof,⁸² and after a sale made in all those cases where he has not been made a party to the foreclosure proceedings,⁸³ and he has not parted with his interest in the mortgaged premises, lost it by laches, or it is barred.⁸⁴

⁷⁹ Ala. Code, § 1885.

⁸⁰ 124 Ind. 349, 24 N. E. 166.

⁸¹ *Goodman v. White*, 26 Conn. 317; *Dawson v. Overmeyer*, 141 Ind. 438, 40 N. E. 1065. See also *Kuntzman v. Smith*, 77 N. J. Eq. 30, 75 Atl. 1009.

⁸² *Wyllie v. Welch*, 51 Wis. 351, 8 N. W. 207. See *ante*, § 1082.

⁸³ *Ætna Life Ins. Co. v. Stryker*, 38 Ind. App. 312, 73 N. E. 953.

A mortgagor who has conveyed the lands to third person cannot exercise any election as to redemption from foreclosure sale. *American Freehold Land Mortg. Co. v. Sewell*, 92 Ala. 163, 9 So. 143, 13 L.R.A. 299; *Miller v. Green*, 138 Ill. 565, 28 N. E. 837, aff'g 37 Ill. App. 631.

But an owner of land who, after conveying it by deed of trust to se-

This right of the mortgagor, or those claiming under him, is not affected or prejudiced by the fact that there is no

cure debts, conveys it in fee subject to the trust deed, expressly reserving a lien for the purchase money, or his administrator, can redeem from foreclosure of the deed of trust. *Pearcy v. Tate*, 91 Tenn. 478, 19 S. W. 323.

A mortgagor who voluntarily conveys the premises to the mortgagee in full satisfaction of the mortgage debt will not be allowed to assert an equity of redemption after the property has greatly appreciated in value in the mortgagee's hands, merely because his notes, although canceled, are not surrendered to him. *Miller v. Green*, 37 Ill. App. 631, aff'd in 138 Ill. 565, 28 N. E. 837.

⁸⁴ See *Hall v. Arnott*, 80 Cal. 348, 22 Pac. 200; *Randall v. Duff*, 79 Cal. 115, 19 Pac. 532, 3 L.R.A. 754, 21 Pac. 610; *Benham v. Rowe*, 2 Cal. 387, 56 Am. Dec. 342; *Colwell v. Warner*, 36 Conn. 224, 232; *Walker v. Carlton*, 97 Ill. 532; *Harms v. Palmer*, 61 Iowa, 483, 16 N. W. 574; *Tetrault v. Labbe*, 155 Mass. 497, 30 N. E. 173; *Merritt v. Hosmer*, 77 Mass. (11 Gray) 276, 71 Am. Dec. 713; *Wilson v. Troup*, 2 Cow. (N. Y.) 195, 14 Am. Dec. 458; *Graves v. Hampden Fire Ins. Co.* 92 Mass. (10 Allen) 281; *Parks v. Allen*, 42 Mich. 482, 4 N. W. 227; *Dickerson v. Hayes*, 26 Minn. 100; *Thompson v. Foster*, 21 Minn. 319; *Hall v. Hall*, 46 N. H. 240; *Pearcy v. Tate*, 91 Tenn. 478, 19 S. W. 323; *Ward v. Seymour*, 51 Vt. 320; *Wylie v. Welch*, 51 Wis. 351, 8 N. W. 207.

In *Walker v. Carlton*, 97 Ill. 582,

A agreed to lend B \$5,000 to be secured by note on six months and deed of trust, which were prepared, delivered, and the deed of trust recorded, and a warrant of attorney given to confess judgment. On the day following, B went to A for the money, but received \$3,000 only for which he gave a note on thirty days, and a warrant of attorneys to confess judgment thereon. After eight months B having paid nothing, the land was sold under the trust deed, the notice of sale stating that the \$5,000 note was held as collateral security for the \$3,000 note, and A bid in the premises for \$2,600. Eight months later, B filed his bill to set aside the sale, and to redeem upon payment of \$3,000. The court, by a majority opinion, held that he was entitled to redeem.

Mortgage deed provided that the mortgagor should keep the premises insured for the mortgagee's benefit. The mortgagor accordingly procured insurance thereon, the policy providing that no sale of the property should affect the right of the mortgagee to recover in case of loss. After the assignment by the mortgagor of his interest, a loss occurred. The insurance company paid the amount of the policy to the mortgagee, and took from him an assignment of the mortgage and policy. The court held that the holder of the equity of redemption might redeem, upon paying to the insurance company the balance due upon the mortgage over and above the amount due upon the policy.

judgment for deficiency;⁸⁵ the mortgagee has foreclosed for more than is due;⁸⁶ has purchased the mortgaged premises under a power in the mortgage,⁸⁷ has conveyed the mortgaged premises in whole or in part,⁸⁸ or is a tenant in common with the mortgagor. He will be required to pay the full amount due,⁸⁹ will not be chargeable with rent,⁹⁰ and will not be entitled to an account of the rents and profits during his occupation where he, after entry for breach of condition, occupies the mortgaged premises under an agreement to pay a stipulated rent, which he neglects to do.⁹¹

And the owner of an equity, who is out of possession, may bring a bill in equity to redeem against the mortgagee and the tenant in possession, notwithstanding the pendency of a suit at law between the mortgagee and tenant for the possession.⁹²

In those cases where the mortgaged land has been conveyed without consideration, though by conveyance purporting to be for a valuable consideration, under a power of attorney to sell and convey, and the grantee gives a mortgage upon it, parties who have succeeded to the right of the original owner upon his death are entitled to redeem from the mortgage.⁹³ And a mortgagor's right of redemption is not barred where the mortgagee, immediately after the expiration of the

Graves v. Hampden, &c., Ins. Co.
92 Mass. (10 Allen) 281.

⁸⁵ Thus it is said in *Hall v. Arnot*, 80 Cal. 348, 22 Pac. 200, that since the adoption of California Civil Code, § 726, a mortgagee who forecloses a deed absolute in form, but in fact only a mortgage, without at the same time foreclosing another deed given to secure the same indebtedness, but upon different property, not being entitled to a personal judgment for deficiency, the right of the mortgagor is not affected by the fact that no judgment for deficiency has been docketed.

⁸⁶ *Dickerson v. Hayes*, 26 Minn. 100, 1 N. W. 834.

⁸⁷ *Benham v. Rowe*, 2 Cal. 387, 56 Am. Dec. 342.

⁸⁸ *Wilson v. Troup*, 2 Cow. (N. Y.) 195, 14 Am. Dec. 458.

⁸⁹ See *post*, § 1191.

⁹⁰ *Merritt v. Hosmer*, 77 Mass. (11 Gray) 276, 71 Am. Dec. 713.

⁹¹ *Merritt v. Hosmer*, 77 Mass. (11 Gray) 276, 71 Am. Dec. 713.

⁹² *Hall v. Hall*, 46 N. H. 240.

⁹³ *Randall v. Duff*, 79 Cal. 115, 19 Pac. 532, 3 L.R.A. 734, 21 Pac. 610.

time limited for payment by a decree in a suit to redeem, fixing the time and amount of payment, and enjoining the mortgagee from foreclosure until a further order, begins proceedings, without first procuring the dismissal of the bill to redeem, to foreclose under the power of sale in his mortgage, and purchases at his own sale.⁹⁴

It has been said that the payment of a decree of foreclosure by a junior mortgagee operates as an assignment of the former mortgage to him, and leaves the mortgagor a right of redemption.⁹⁵ But the supreme court of Connecticut, in the case of *Colwell v. Warner*,⁹⁶ say that where a second mortgagee has foreclosed, and subsequently redeems the prior mortgage, as he has a right to do, paying the debt as his own, the mortgagor has no right to redeem the first mortgage, if his claim is resisted by the second mortgagee. The second mortgage conveys all the mortgagor's interest. The foreclosure removes the condition and converts the conveyance into an absolute one, though the thing conveyed remains the same. It seems, however, that where a part only of the mortgage debt is transferred, to collect which the transferee sells the land under foreclosure, and the mortgagee redeems, he does not thereby acquire any additional rights, and the mortgagor will be entitled to redeem on paying the amount for which the land was sold, with costs.⁹⁷

§ 1108. Mortgagor and wife—May redeem, when.—
The owner of a homestead is entitled to redeem the lien of

⁹⁴ *Tetrault v. Labbe*, 155 Mass. 497, 30 N. E. 173.

Where a bill to enforce the discharge of a mortgage had been filed before the time for redemption had expired, but after foreclosure was begun, and it was held that the complainant mortgagor was not entitled to discharge, he was allowed to redeem on paying the

amount of the debt with interest at the stipulated rate, and the costs of foreclosure, with interest, but without the attorney fee provided for in the mortgage. *Parks v. Allen*, 42 Mich. 482, 4 N. W. 227.

⁹⁵ *Ward v. Seymour*, 51 Vt. 320.

⁹⁶ 36 Conn. 224, 232.

⁹⁷ *Harms v. Palmer*, 61 Iowa, 483, 16 N. W. 574.

a mortgage on the land occupied and set apart as such;⁹⁸ consequently a mortgagor and wife having a homestead, and she an inchoate right of dower in the premises,⁹⁹ they may maintain a bill to redeem, although not entitled to an assignment of the mortgage.¹

§ 1109. Mortgagors—Joint—Redemption by.—In the Case of Commercial Real Estate and Building Association v. Parker,² it is held that one of two joint mortgagors cannot, without authority from the other, make an offer to redeem which will support an action for redemption by both.

§ 1110. Partner may redeem.—The interest of a partner in lands mortgaged by the firm is sufficient to enable him to redeem from the mortgage under a statute³ authorizing redemption by the mortgagor or any person lawfully claiming or holding under him, full equity jurisdiction being conferred by the statute upon the court.⁴

The supreme judicial court of Massachusetts, in the case of Emerson v. Atkinson,⁵ say that an unexecuted agreement to compromise, although it postpones the adjustment of the rights of the parties thereto, does not cut off the right of one of them in a suit against the other to establish a partnership to redeem from mortgages held by other defendants, although the court may protect their rights by interlocutory orders as to the payment of the money on the mortgages, or may direct a sale under powers in the mortgage.

§ 1111. Persons in interest not made parties.—We have heretofore seen that it is necessary to make parties to fore-

⁹⁸ *Butts v. Broughton*, 72 Ala. 294; *Kirby v. Reese*, 69 Ga. 452; *Erwin v. Blanks*, 60 Tex. 583; *Cosborne v. Inglis*, 1 Ark. 606.

⁹⁹ See *post*, § 1133.

¹ *Lamb v. Montague*, 112 Mass. 352.

² 84 Ala. 298, 4 So. 268.

³ As Mass. Stat. 1877, c. 178.

⁴ *Emerson v. Atkinson*, 159 Mass. 356, 34 N. E. 516.

⁵ 159 Mass. 356, 34 N. E. 516

closure proceedings all persons having an interest in the land in order to cut off their equity of redemption,⁶ hence all parties interested in the premises, who were not served with process, may redeem from a sale under decree of foreclosure, just the same as if no such decree had been made.⁷

§ 1112. Purchaser—Subsequent purchaser.—Where a person takes a deed with notice of a prior mortgage under such circumstances that, as against such mortgage, he can not be regarded as a *bona fide* purchaser, he and his privies will be entitled to redeem from such mortgage,⁸ and this right can be cut off only by a proper foreclosure,⁹ by laches, estoppel *in pais*,¹⁰ or barred in the regular way;¹¹ a decree of foreclosure in a suit to which such purchaser or his privies were not parties, will not affect the right of redemption.¹²

⁶ See *ante*, 136, *et seq.*

⁷ *Wiley v. Ewing*, 47 Ala. 418; *Hodgen v. Guttery*, 58 Ill. 431; *Strang v. Allen*, 44 Ill. 422; *Smith v. Sinclair*, 10 Ill. 108; *Nesbit v. Hanway*, 87 Ind. 400; *Holmes v. Bybee*, 54 Ind. 262; *Bunce v. West*, 62 Iowa, 80, 17 N. W. 179; *Gower v. Winchester*, 33 Iowa, 303; *Pratt v. Freat*, 13 Wis. 462; *Murphy v. Farwell*, 9 Wis. 102; *Farwell v. Murphy*, 2 Wis. 533; *Noyes v. Hall*, 97 U. S. 34, 34 L. ed. 909; *Thomson v. Dean*, 74 U. S. (7 Wall.) 342, sub nom. *Dean v. Nelson*, 19 L. ed. 94. See *Ætna Life Ins. Co. v. Stryker*, 38 Ind. App. 312, 78 N. E. 245.

In *Thomson v. Dean*, 74 U. S. (7 Wall.) 342; sub nom. *Dean v. Nelson*, 19 L. ed. 94, parties not notified of proceedings to foreclose, taken during the late civil war, while they were within the lines of the enemy, were allowed to redeem

on condition of the payment of principal and interest in full.

The supreme court of Indiana, in the case of *Holmes v. Bybee*, 34 Ind. 262, say that under the statute of that state (2 Gav. & H. 251) providing for the redemption of real property sold on execution or order of sale, &c., does not cut off or affect any right of redemption existing by the general principles of law, and held by one who was not a party to the "judgment, decree, or other judicial proceedings," on which the sale was made.

⁸ *Stone v. Welling*, 14 Mich. 514.

⁹ See *ante*, § 1055.

¹⁰ See *ante*, § 1061.

¹¹ See *post*, chap. XLVI.

¹² See *Smith v. Connor*, 65 Ala. 371; *Dunlap v. Wilson*, 32 Ill. 518; *Jackson v. Warren*, 32 Ill. 335; *Hurd v. Case*, 32 Ill. 45, 83 Am. Dec. 249; *Ohling v. Lintgens*, 32 Ill. 24.

But when subsequent purchasers or incumbrancers¹³ file a bill in equity against the first mortgagee and a purchaser under him, asking an account and redemption, and not denying that there is a balance due on the mortgage debt, they must make a tender in the bill, or offer to pay whatever balance is found due.¹⁴

§ 1113. Same—Before foreclosure.—A purchaser of the equity of redemption from the mortgagor prior to the institution of foreclosure proceedings, succeeds to all the rights of the mortgagor,¹⁵ and where not made a party to the proceedings a foreclosure and sale of the mortgaged premises does not affect his right of redemption.¹⁶ Such purchaser from the mortgagee, whether of the whole or only a portion of the mortgaged premises, must pay the whole mortgage debt,¹⁷ even though the mortgagor has obtained a certificate of dis-

¹³ See *post*, § 1123.

¹⁴ *Smith v. Connor*, 65 Ala. 371. See *post*, § 1219.

¹⁵ See *Allen v. Swoope*, 64 Ark. 576, 44 S. W. 78. Where a mortgagee entered upon land to foreclose a mortgage in which the mortgagor's wife had not joined, but did not take possession of the house, nor receive rent therefor, she having continued in possession of the house, claiming it as a homestead, on a bill in equity to redeem, brought by an assignee of the equity of redemption, the court held that the mortgagee was not accountable for the rent of the house. *Taft v. Stetson*, 117 Mass. 471.

¹⁶ *Moore v. Anders*, 14 Ark. 678, 60 Am. Dec. 537; *Boggs v. Fowler*, 16 Cal. 559, 76 Am. Dec. 561; *Goodenow v. Ewer*, 16 Cal. 461, 76 Am. Dec. 540; *Whitney v. Higgins*, 10 Cal. 547, 70 Am. Dec. 748;

Bradley v. Snyder, 14 Ill. 263, 58 Am. Dec. 564; *Frische v. Kramer's Lessee*, 16 Ohio, 125, 47 Am. Dec. 368; *Childs v. Childs*, 10 Ohio St. 339, 75 Am. Dec. 512; *Clark v. Reyburn*, 75 U. S. (8 Wall.) 321, 19 L. ed. 354; *Livingston v. New England Mortgage Security Co.* 77 Ark. 379, 91 S. W. 752; *Licata v. de Corte*, 50 Fla. 563, 39 So. 58.

¹⁷ *Douglass v. Bishop*, 27 Iowa, 216; *Knowles v. Rablin*, 20 Iowa, 104; *Street v. Beal*, 16 Iowa, 68, 85 Am. Dec. 504; *Wood v. Goodwin*, 49 Me. 260, 77 Am. Dec. 259; *Johnson v. Candage*, 31 Me. 28; *Smith v. Kelly*, 27 Me. 237, 46 Am. Dec. 595; *Gibson v. Crehore*, 22 Mass. (5 Pick.) 146; *Taylor v. Porter*, 7 Mass. 355; *Childs v. Childs*, 10 Ohio St. 339, 75 Am. Dec. 512. Compare *Dukes v. Turner*, 44 Iowa, 579. See *post*, § 1171.

charge in bankruptcy. The certificate only discharges the mortgagor from personal liability upon the debt.¹⁸

In the case of *Booker v. Waller*,¹⁹ where one purchased land and gave a mortgage for its price to his grantors, who had given a mortgage to their grantors to secure the purchase money, and the land was foreclosed and sold under the latter mortgage, he was held, upon the evidence, entitled to redeem the property as against the wives of his grantors claiming under an executory contract of purchase made in their names through the intervention of a trustee, which contract had been rescinded by its own terms upon the redemption of the lands by a judgment creditor of the husbands, but renewed through the intervention of the trustee with the creditor so redeeming, after he had taken title.

§ 1114. **Same—Pending foreclosure.**—In some states a person acquiring an interest in the mortgaged property pending a foreclosure suit will not generally be permitted to redeem,²⁰ for the reason that all parties acquiring an interest in the subject matter of the suit *pendent lite* are bound and concluded by the judgment or decree;²¹ and the grantee of the land by a deed which is not delivered until after the foreclosure of a mortgage on the same land, cannot redeem from the mortgage, even though he was not served with the summons in the action,²² because the court is not bound to take notice of any interest acquired by purchase in the subject matter of the suit pending the action.²³ It is held by some of

¹⁸ *Childs v. Childs*, 10 Ohio St. 339, 75 Am. Dec. 512.

¹⁹ 81 Ala. 549.

²⁰ *Cook v. Mancius*, 5 John. Ch. (N. Y.) 89.

²¹ *Cook v. Mancius*, 5 John. Ch. (N. Y.) 89. See *Craig v. Ward*, 36 Barb. (N. Y.) 382; *Harrington v. Slade*, 22 Barb. (N. Y.) 161; *People's Bank v. Hamilton Mfg.*

Co. 10 Paige Ch. (N. Y.) 481; *Sedgwick v. Cleveland*, 7 Paige Ch. (N. Y.) 287; *Darling v. Osborne*, 51 Vt. 150; *Heller v. King*, 54 Neb. 22, 74 N. W. 423.

²² *Russ v. Stratton*, 11 Misc. 565, 32 N. Y. Supp. 767.

²³ *Cook v. Mancius*, 5 John. Ch. (N. Y.) 89. See *Hall v. Jack*, 32 Md. 253; *Inlocs v. Harvey*, 11 Md.

the cases, however, that the equity of redemption is not extinguished until after a sale made under the judgment and decree of the court, and that consequently one purchasing after the decree, but before the sale, is entitled to redeem.²⁴

§ 1115. **Same—After foreclosure.**—The grantee of the mortgagor has a right to redeem, though not mentioned in the decree of foreclosure,²⁵ by paying the balance due upon the mortgage after sale under foreclosure, as well as the purchase money.²⁶ He may redeem notwithstanding a foreclosure and sale, when he was not made a party to the foreclosure proceedings;²⁷ and it matters nothing to the mortgagee, or those claiming under the mortgagee, whether the conveyance of the equity of redemption was voluntary or even fraudulent as to creditors.²⁸ It is held in New York, however, that a grantee of land by a deed which is not delivered until after the foreclosure of a mortgage on the land

524; *Haven v. Adam*, 90 Mass. 48 Allen) 366; *McPherson v. Housel*, 13 N. J. Eq. (2 Beas.) 301; *Allen v. Morris*, 34 N. J. L. (5 Vr.) 159; *Harrington v. Slade*, 22 Barb. (N. Y.) 161; *Murray v. Ballou*, 1 John. Ch. (N. Y.) 566; *Porter v. Barclay*, 18 Ohio St. 546; *Price v. White*, 1 Bailey (S. C.) Eq. 244; *Lewis v. Mew*, 1 Strobl. (S. C.) Eq. 180; *August v. Seeskind*, 6 Cold. (Tenn.) 166; *Allen v. Atchison*, 26 Tex. 616; *Davis v. Christian*, 15 Gratt. (Va.) 1; *Tilton v. Cofield*, 93 U. S. 163, 23 L. ed. 858; *Worsley v. Scarborough*, 3 Atk. 392; *Mead v. Orrery*, 3 Atk. 242; *Garth v. Ward*, 2 Atk. 175; *Moore v. McNamara*, 2 Ball & B. 186, 12 Rev. Rep. 73; *Gaskeld v. Durdin*, 2 Ball & B. 169; *Re Barnard's Banking Company, L.*

R. 2 Ch. 171; *Sorrell v. Carpenter*, 2 Pr. Wms. 482; *Winchester v. Paine*, 11 Ves. 194, 8 Rev. Rep. 131, Com. Dig. Ch. 4 C. 3 & 4, 2 Fonbl. Eq. B. 2 C. 6, S. 3, note n.
²⁴ *Willis v. Smith*, 66 Tex. 31, 17 S. W. 247. See also *Davis v. Greenwood*, 2 Neb. (Inof.) 317, 96 N. W. 526.

²⁵ *Farrell v. Parlier*, 50 Ill. 274.

²⁶ *Bradley v. Snyder*, 14 Ill. 263, 58 Am. Dec. 564.

²⁷ See *Phillips v. Hagart*, 113 Cal. 552, 54 Am. St. Rep. 369, 45 Pac. 843.

²⁸ *Bradley v. Snyder*, 14 Ill. 263, 58 Am. Dec. 564. See *Houston v. National Mutual Building & Loan Ass'c.* 80 Miss. 31, 92 Am. St. Rep. 565, 31 So. 540.

cannot redeem from the mortgage, although not served with the summons in the action.²⁹

The equity of redemption not being extinguished until after a sale under the decree of foreclosure, one purchasing after the decree, but before the sale, may redeem.³⁰ Thus, it is said by the supreme court of Connecticut, in the case of *Loomis v. Knox*,³¹ that a conveyance by a mortgagor whose right to redeem has been foreclosed, and who is not in possession, of all interest in the premises to a third person, is valid, and passes a right of redemption acquired by payment of the debt of a junior lienor who was not made a party to the foreclosure proceeding. But an assignee of the equity of redemption under a mortgage executed at a time when the assignee of the equity has no right to redeem cannot be given such right by subsequent legislation.³²

The Texas court of civil appeals, in the case of *Maulding v. Coffin*,³³ say that a purchaser from the mortgagor in a mortgage containing a power of sale, of which the purchaser had notice, has no right to redeem from such sale after the exercises of such power and a sale of the premises by the mortgagee. The rule as to the right of redemption in case of a judicial foreclosure sale, to which the owner is not made a party, is inapplicable in such case.

§ 1116. Same—At execution sale.—Where the equity of redemption is sold under a levy of execution, the mortgagor's right to redeem is thereby lost to him,³⁴ and passes

²⁹ *Russ v. Stratton*, 11 Misc. 565. 32 N. Y. Supp. 767.

³⁰ *Loomis v. Knox*, 60 Conn. 343, 22 Atl. 771; *Willis v. Smith*, 60 Tex. 31. See *McMillan v. Richards*, 9 Cal. 365, 70 Am. Dec. 655.

Mortgagor's estate after foreclosure sale, and before conveyance to purchaser is subject to the lien of a judgment against the mort-

gagor. *McMillan v. Richards*, 9 Cal. 365, 70 Am. Dec. 655.

³¹ 60 Conn. 343, 22 Atl. 771.

³² *Lehman v. Moors*, 93 Ala. 186, 9 So. 590.

³³ 6 Tex. Civ. App. 416, 25 S. W. 480.

³⁴ *Punderson v. Brown*, 1 Day (Conn.) 93, 2 Am. Dec. 53.

to the purchaser, who may redeem if he so elects,³⁵ but cannot be compelled to do so,³⁶ and where he elects to exercise this right, he will be subrogated to the rights of the mortgagee.³⁷ It is thought the holder of a sheriff's certificate, given on an execution sale, has a right to redeem from a foreclosure sale as a lienholder, but not as an owner, although no express provision is made therefor by statute.³⁸ His right under his

³⁵ *Cohn v. Hoffman*, 56 Ark. 119, 19 S. W. 233; *Robertson v. Van Cleave*, 129 Ind. 217, 231, 26 N. E. 899, 15 L.R.A. 68; *Nesbitt v. Hanway*, 87 Ind. 400; *Julian v. Bell*, 26 Ind. 220, 89 Am. Dec. 460; *Hammond v. Leavitt*, 59 Iowa, 407; *Phillips v. Winslow*, 18 B. Mon. (Ky.) 431, 68 Am. Dec. 729. See *Boarman v. Catlett*, 21 Miss. 149; *Insley v. United States*, 105 U. S. 512, 37 L. ed. 1163, 14 Sup. Ct. Rep. 158; *Pollard v. Harlow*, 138 Cal. 390, 71 Pac. 454, 648. See *Hawkeye Ins. Co. v. Maxwell*, 119 Iowa, 672, 94 N. W. 207. See also *Law v. Citizen's Bank of Northfield*, 85 Minn. 411, 89 Am. St. Rep. 566, 89 N. W. 320. But see *Shumate as adm'r etc. v. McLendon*, 120 Ga. 396, 48 S. E. 10.

Purchaser of equity of redemption at sheriff's sale succeeds to the rights of the judgment plaintiff, and may redeem as against a prior incumbrancer before foreclosure and sale, although he or the judgment plaintiff may have been a party to the foreclosure suit. *Julian v. Bell*, 26 Ind. 220, 89 Am. Dec. 460.

³⁶ *Rogers v. Meyers*, 68 Ill. 92.

³⁷ *Hammond v. Leavitt*, 59 Iowa, 407, 13 N. W. 397.

³⁸ *Robertson v. Van Cleave*, 129 Ind. 217, 26 N. E. 899, 15 L.R.A. 68.

In *Alabama* the purchaser at an execution sale of the equity of redemption in mortgaged lands has no equity, upon seeking redemption from the mortgagee, to compel the application of personal property embraced in the same mortgage, to the payment of the mortgage debt to the exoneration of the land; and the appointment of a receiver to take charge of such personality, upon bill filed by the purchaser to redeem the mortgaged lands, and an order for its sale and the application of the proceeds to the mortgage debt, in case of the land, are erroneous. *Lovelace v. Webb*, 62 Ala. 271.

In *Arkansas* a judgment creditor who purchased his debtor's equity of redemption in lands at execution sale on his judgment, subject to prior mortgage liens, is entitled to redeem from the mortgagee, who, after the rendition of the judgment, but before the execution sale, bought up several claims against the debtor, and took a deed from him in satisfaction of all his demands, and went into possession, by payment of the prior mortgage liens only, without paying the debts created after his judgment lien attached to the land. *Cohn v. Hoffman*, 56 Ark. 119, 19 S. W. 233.

In *Indiana* a purchaser at a sher-

purchase is essentially that of a judgment creditor,³⁹ and to be valid the judgment and execution must be regular, where the judgment upon which the execution was issued is irregular. the sale will be invalid, the purchaser acquires no right to redeem from a mortgage foreclosure sale of the land, and the title acquired under such foreclosure will not be divested by such redemption.⁴⁰

In those cases where the purchaser of the mortgagor's

iff's sale of mortgaged property, not made a party to a suit to foreclosure brought before his right to a deed matures, may redeem after his title matures, and need not aver a tender or offer to pay the money necessary to redeem. *Nesbit v. Hanway*, 87 Ind. 400.

A statement by the holder of a sheriff's certificate, in order to give him the right to redeem from a mortgage sale, must, under Ind. Rev. Stat. § 772, state the amount and date of the judgment, as well as the amount due and unpaid; and a mere reference to the sheriff's certificate is not sufficient. *Id.* *Roberts v. Van Cleave*, 129 Ind. 217, 26 N. E. 899, 15 L.R.A. 68; *Nesbitt v. Hanway*, 87 Ind. 400.

In Kentucky a purchaser under sale of equity of redemption only acquires lien upon it for the payment of the purchase money and interest, since the adoption of the revised statutes of Kentucky; and if, at the sale, the previous incumbrancer is in possession, under the terms of the deed creating the incumbrance, a court of equity will secure him in the possession, leaving to the purchaser the benefit of the lien acquired under the sale. *Phillips v. Winslow*, 18 B. Mon. (Ky.) 431, 68 Am. Dec. 729.

In Mississippi, there is an exception to the general rule, it being held in that state that a purchaser of mortgaged property under execution against the mortgagor, before forfeiture of the mortgage, or payment of the mortgaged debt, having by his purchase acquired no interest in or lien of the mortgaged property, has no right to redeem it. But it would be otherwise if by the purchase he acquired any right. *Boarman v. Catlett*, 21 Miss. 149.

The United States Supreme Court say that where real estate is sold on execution, and is afterwards sold on foreclosure of a prior mortgage, the purchaser at the execution sale, if not made a party to the foreclosure proceedings, may redeem and treat the deed made on foreclosure as a mortgage and the purchaser on foreclosure sale as a mortgagee in possession. *Insley v. United States*, 150 U. S. 512, 37 L. ed. 1163, 14 Sup. Ct. Rep. 158.

³⁹ *Robertson v. Van Cleave*, 129 Ind. 217, 26 N. E. 899, 15 L.R.A. 68.

⁴⁰ *Wooters v. Pinkel* (Ill.) 25 N. E. 791; aff'd *Hoovers v. Joseph*, 137 Ill. 113, 31 Am. St. Rep. 355, 27 N. E. 80.

equity of redemption at an execution sale exercises the right and redeems the mortgage, the mortgagor may redeem from the execution sale within the time allowed by law, and thereafter redeem from the mortgage sale within the time allowed for that purpose.⁴¹

§ 1117. **Same—At foreclosure sale.**—A purchaser at a foreclosure sale of a first mortgage, with knowledge that persons interested in the mortgaged premises were not made parties to the foreclosure suit, takes the title thereto subject to the right of redemption in such interested parties;⁴² and on assignment, with like notice, his assignee will hold subject to the same right of redemption.⁴³

The purchaser at a foreclosure sale of a junior mortgage may, within the time allowed by statute, redeem from the foreclosure of a prior mortgage.⁴⁴ But it is said that a purchaser at a mortgage foreclosure sale, who has neglected to pay the balance of the purchase price until the mortgagee has elected to treat the contract of purchase as abandoned and

⁴¹ *Atkins v. Sawyer*, 18 Mass. (1 Pick.) 351, 354, 11 Am. Dec. 188.

⁴² *Murphy v. Farwell*, 9 Wis. 102.

⁴³ *Hoppin v. Doty*, 22 Wis. 621; *Hodson v. Treat*, 7 Wis. 263.

⁴⁴ *Hasselman v. McKernan*, 50 Ind. 441; *Buchanan v. Reid*, 43 Minn. 172, 45 N. W. 11; *Minter v. Carr*, (1894) 2 Ch. 321. See also *Geishaker v. Pancoast*, 57 N. J. Eq. 60, 40 Atl. 200.

As a "creditor having a lien," in Minnesota, *Buchanan v. Reid*, 43 Minn. 172, 45 N. W. 11.

In Indiana, the holder of a junior mortgage who has foreclosed his mortgage in a suit without making a senior mortgagee a party, and who has bought in the mortgaged premises at a sheriff's sale on the

decree, has a right to redeem the mortgaged premises from the senior mortgage, though the senior mortgagee may have previously foreclosed his mortgage without making the holder of the junior mortgage a party to the action, and though the premises may have been sold by the sheriff on the decree and bought in by the senior mortgagee. *Hasselman v. McKernan*, 50 Ind. 441.

In England, it is held that the right of redemption by a purchaser under a second mortgage to redeem the property covered by that mortgage alone, as against one holding first mortgages upon that and other properties from the same mortgagor, is not affected by the

has transferred all his interest to another, cannot, as against the latter, redeem the premises from the mortgage and enforce his purchase.⁴⁵

§ 1118. **Same—From sole heir.**—The supreme court of Michigan, in the case of *Squire v. Wright*,⁴⁶ say that one to whom the sole heir of a mortgagor executed a deed to enable him to redeem from a sale on foreclosure, made after the departure and reputed death of the mortgagor, has a right to redeem for the mortgagor, if living, and if not, then for himself as grantee of the heir.

§ 1119. **Same—From grantee of owner of equity of redemption.**—In the recent case of *Case v. Fry*,⁴⁷ the supreme court of Iowa say that a purchaser of land by quit claim deed from one whose right to redeem from a foreclosure sale has not expired, has the right to redeem, notwithstanding an agreement made before the commencement of foreclosure proceedings, by which the grantor and his wife conveyed the land to trustees, with a provision that the trustees should sell the land and pay all commissions, costs, and expenses, and turn over the remaining proceeds or deed the residue of the land upon the order of the grantor's wife, where it is provided that the stipulation shall be in force and effect for one year only, and that time is the essence of the stipulation, and no sale of the property, or any part of it, is made by the trustees, although the decree of foreclosure recognizes the trust agreement and the money is paid to the trustees in consequence, but the scope and effect of such agreement are not involved in the foreclosure proceedings, and no attempt is made to extend

fact that a prior holder of such second mortgage and of the equity of redemption held a subsequent mortgage upon both properties. *Minter v. Carr*, (1894) 2 Ch. 321.

⁴⁵ *Atkins v. Tutwiler*, 98 Ala. 129, 11 So. 640.

⁴⁶ 85 Mich. 76, 48 N. W. 286.

⁴⁷ 91 Iowa, 132, 59 N. W. 333.

it beyond the year provided for, and such year has not expired when the decree was made.

§ 1120. **Remainderman and revisioner.**—A right of redemption is vested in a remainderman or a revisioner of real property.⁴⁸ It has been said, by the supreme court of Missouri, in the case of *Stevenson v. Edwards*,⁴⁹ that a remainderman, under a deed, has a right to redeem lands conveyed thereby and mortgaged by the life tenant, although such deed has been declared fraudulent as against creditors, as such fraud does not affect the rights of the parties as between themselves.

§ 1121. **Stranger to transaction.**—We have already seen that, to entitle a person to redeem from a mortgage, he must show good title in himself, and a legal right to redeem, before he, though holding the title of a mortgagor, can effect the discharge of the mortgage, or remove a prior incumbrance;⁵⁰ hence, an action cannot be maintained by a mere volunteer or stranger to the transaction,⁵¹ unless the right to redeem has been reserved to such stranger, and then it must be an express reservation.⁵² But should the purchaser at an execution sale permit redemption to be made by a stranger,

⁴⁸ *Stevenson v. Edwards*, 98 Mo. 622; *Raffey v. King*, 1 Keen, 601; *Rawald v. Russel*, Younge 9. See *Engel v. Ladewig*, 153 Mich. 8, 116 N. W. 550. See also *Snook v. Zentmyer*, 91 Md. 485, 46 Atl. 1008.

⁴⁹ 98 Mo. 622, 12 S. W. 255.

⁵⁰ *Eastman v. Batchelder*, 26 N. H. 141, 72 Am. Dec. 295. See *ante* § 1077.

⁵¹ *Phyfe v. Riley*, 15 Wend. (N. Y.) 248, 30 Am. Dec. 50. See *Butts v. Broughton*, 72 Ala. 294; *Rapier v. Gulf City Paper Co.* 64 Ala. 330; *Union Mutual Life Insur-*

ance Co. v. White, 106 Ill. 67; *Rogers v. Meyer*, 68 Ill. 92; *Beach v. Shaw*, 57 Ill. 17; *Skinner v. Young*, 80 Iowa, 234, 45 N. W. 889; *Penn v. Clemans*, 19 Iowa, 372; *Bayington v. Buckwalter*, 7 Iowa, 512, 74 Am. Dec. 279; *Powers v. Gold Lumber Co.* 43 Mich. 468, 5 N. W. 656; *Haywood v. Underwood*, 28 Mich. 427; *Cousin v. Allen*, 28 Mich. 232; *Moore v. Beason*, 44 N. H. 215; *Meehan v. Forrester*, 52 N. Y. 277; *Eaton v. North*, 25 Wis. 514.

⁵² *Purvis v. Brown*, 4 Ired. (N. C.) Eq. 415.

the latter will be considered as acting on behalf of the execution defendant.⁵³

§ 1122. Sub-agent—May redeem, when.—In those cases where redemption to mortgaged premises is effected through a sub-agent, under color of authority, and the acts of such sub-agent are subsequently ratified by the principals, it will be binding upon the person who purchased the land at foreclosure sale.⁵⁴ In the course of the opinion, in the case of *Teucher v. Hiatt*,⁵⁵ the supreme court of Iowa say: "While it is true, as stated by counsel for appellant, that 'agency is generally a personal trust and confidence which cannot be delegated,' yet there is nothing in this case to show but that the agent Ratcliff was authorized to effect the redemption through a sub-agent. The ratification of the act of the sub-agent would tend to show that this was so. However this may be, the redemption effected by such sub-agent, under color of authority, and whose act was ratified by the principal, is good and sufficient as against the defendant Stewart."⁵⁶

§ 1123. Subsequent lienor.—It is a well established principle that parties acquiring an interest subsequent to the plaintiff in an action for the foreclosure of a mortgage and before the commencement of such action, who are not parties, possess both a statutory and an equitable right to redeem from the sale made under the judgment and decree in such action.⁵⁷

⁵³ *Phyfe v. Riley*, 15 Wend. (N. Y.) 248, 30 Am. Dec. 55.

⁵⁴ *Tencher v. Hiatt*, 23 Iowa, 527, 92 Am. Dec. 440.

⁵⁵ 23 Iowa, 527.

⁵⁶ See *Masterson v. Beasley*, 3 Ohio, 301; *McCord v. Bergautz*, 7 Watts. (Pa.) 487; *Patterson v. Brindle*, 9 Watts. (Pa.) 98. See *Blackwell Tax Titles*, 501, 504.

⁵⁷ *Moore v. Andres*, 14 Ark. 678, 60 Am. Dec. 551; *Whitney v. Hig-*

gins, 10 Cal. 547, 70 Am. Dec. 748; *Bradley v. Snyder*, 14 Ill. 263, 58 Am. Dec. 564; *Stewart v. Johnson*, 30 Ohio St. 30; *Frische v. Kramer's Lessee*, 16 Ohio, 125, 47 Am. Dec. 368; *Clark v. Reyburn*, 75 U. S. (8 Wall.) 321, 19 L. ed. 354; *Equitable Land Co. v. Allen*, 84 Neb. 514, 121 N. W. 600. See *Dickinson v. Duckworth*, 74 Ark. 138, 85 S. W. 82. See also *Horr v. Herrington*, 22

Such subsequent lienholder cannot be deprived of his right to collect his debt by redemption, to the extent of the value of the property sold over the amount paid to redeem, by the interposition of the liens of fraudulent and simulated securities.⁵⁸ It is thought that the right of a junior mortgagee to redeem from the senior mortgagee, by paying his debt, with interest and costs, is an equitable right, founded on common law principles, and is entirely independent of the statutory right of redemption given to judgment creditors.⁵⁹ It has been properly said that a subsequent party in interest, whether by way of mortgage liens or judgment, cannot, on motion, obtain a right to redeem and have the property conveyed to him by a purchaser.⁶⁰ The only remedy in such a case is by action seeking to enforce the right of redemption.⁶¹ Where there is more than one lien creditor to redeem the date of record governs the order of redemption.⁶²

Okla. 590, 20 L.R.A.(N.S.) 47, 98 Pac. 443.

⁵⁸ *Parker v. St. Martin*, 53 Minn. 1, 55 N. W. 113.

⁵⁹ This right applies equally to deeds of trust to secure the payment of debts and to mortgages proper. *Wiley v. Ewing*, 47 Ala. 418. See *Beach v. Shaw*, 57 Ill. 17; *Hodgen v. Guttery*, 58 Ill. 431.

⁶⁰ See *ante*, § 1035.

⁶¹ *Douglass v. Woodworth*, 51 Barb. (N. Y.) 79.

In this case it is said that in a foreclosure suit, after the property has been sold and the deed delivered on such a motion made alleging that the parties have been misled by erroneous information, the only thing that can be done is to put the judgment suit aside on sale and conveyance, and order a resale of the property. Such sale can be made only on terms indemnifying the purchaser, repaying to

him the money paid to him on the purchase and all expenses incident thereto. *Douglass v. Woodworth*, 51 Barb. (N. Y.) 79.

Under Iowa Rev. Stat. § 3664, upon action at law upon notes secured by mortgage, a junior mortgagee has a right to redeem only as provided by that section of the statute. He has a right of redemption distinguished from an equity of redemption. *Mayer v. Farmer's Bank*, 44 Iowa, 212.

In this case the judgment obtained was properly made a lien upon the lands covered by the mortgage. And if it was by its terms made a lien upon all the real estate of defendant, including other than that covered by the mortgage, this would not render it void, but only voidable, as property not embraced in the mortgage.

⁶² *Bartleson v. Munson*, 105 Minn. 348, 117 N. W. 512.

§ 1124. **Sureties may redeem.**—On the well recognized principle that a surety has the right to avail himself of the securities held by the creditor, after he has satisfied the debt, a surety for the mortgage debt, even though he has no interest in or lien upon the mortgaged estate, has a right to redeem from the mortgage lien and be subrogated to the rights of the mortgagee.⁶³ But it has been held by the supreme court of Iowa, in the case of *Miller v. Ayres*,⁶⁴ that a surety on a mortgage note, against whom judgment has been rendered in proceedings to foreclose, has no right to redeem from the purchaser at the foreclosure sale. The court say: "Counsel for the plaintiff insist that a surety has the right to redeem to the same extent as the principal debtor, and when he does so is entitled to be subrogated to the rights of the creditor. Authorities are cited in support of this proposition. That a surety before a sale may pay off a debt, and be subrogated to the rights of the creditor, is probably true. The authorities cited do not, we think, go further than this. But the right of any person to redeem, after a sale under a mortgage foreclosure, depends upon the statute. If there is no statute so providing there is no such right."

§ 1125. **Tenant by the curtesy.**—That a tenant by the curtesy has such an interest in the mortgaged lands as will entitle him to redeem, is settled by two old cases.⁶⁵ I am not

⁶³ *Averill v. Taylor*, 8 N. Y. 44, 51; *Ex parte Crisp*, 1 Atk. 133; *Green v. Wynn*, L. R. 21 Ch. 204; *Wade v. Coope*, 2 Sim. 155; *Mayhew v. Cricket*, 2 Swanst. 185; *Wright v. Morley*, 11 Ves. 21, 8 Rev. 69.

The dictum of Sir William Grant, Master of the Rolls, in *Wright v. Morley*, *supra*, to the effect that a creditor is entitled to the benefit of the securities given by the principal debtor was supposed to rest upon

Mawer v. Harrison, 1 Eq. Cas. Abr. 93, but an investigation of that case revealed that it is no real authority for any such proposition, and in the absence of any other authority in support of the dictum, the court declined to follow it in *In re Walker*, (1892) 1 Ch. 621.

⁶⁴ 59 Iowa, 424, 13 N. W. 436.

⁶⁵ See *Swannock v. Penelope*, Ambl. 6; *Casburne v. Inglis*, 2 Jac. & W. 194.

aware that the question has been adjudicated in this country, but on principle I regard the decisions in the English cases cited above, as correct.

§ 1126. **Tenant in dower.**—It is well settled that an inchoate right of dower in a wife is a sufficient estate in mortgaged lands to entitle her to maintain a bill in equity to redeem such lands, and the fact that she joined her husband in the execution of the mortgage will not affect her rights;⁶⁶ and she may redeem although an assignment of dower has not yet been made to her.⁶⁷ The widow's right to redeem exists equally whether the mortgage was executed before or after marriage.⁶⁸ The reason for this is that the widow is directly interested in the payment of the mortgage debt, and so long as the title of the mortgagee has not been made absolute by foreclosure, she is entitled to pay the debt and take dower in the premises. She may avail herself of the right that she has, even at law, as against all others, in any mode not inconsistent with the rights and interest of the mortgagee.⁶⁹

The supreme judicial court of Massachusetts, in the case of *Davis v. Wetherell*,⁷⁰ say that no adjudged case has been found in which a wife having an inchoate right of dower

⁶⁶ *Davis v. Wetherell*, 95 Mass. (13 Allen) 60, 90 Am. Dec. 177. See *Wiley v. Ewing*, 47 Ala. 227; *Fletcher v. Holmes*, 38 Ind. 497, 537; *Wilkins v. French*, 20 Me. 111; *Lamb v. Montague*, 112 Mass. 352; *Farwell v. Cotting*, 90 Mass. (8 Allen) 211; *Burns v. Lynde*, 88 Mass. (6 Allen) 305; *Eaton v. Simonds*, 31 Mass. (14 Pick.) 98; *Greiner v. Klein*, 28 Mich. 16; *Bell v. Mayor, etc. of New York*, 10 Paige Ch. (N. Y.) 49; *Vanduyne v. Thayer*, 14 Wend. (N. Y.) 236; *Kling v. Ballentine*, 40 Ohio St. 394; *Gatewood v. Gatewood*, 75 Va. 407.

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⁶⁷ *Henty's Case*, 58 Mass. (5 Cush.) 257; *Gibson v. Crehore*, 22 Mass. (5 Pick.) 151, 153; *Peabody v. Patton*, 19 Mass. (2 Pick.) 519.

⁶⁸ *Opdyke v. Barddes*, 11 N. J. Eq. (3 Stock.) 133.

⁶⁹ *Bell v. Mayor, etc. of New York*, 10 Paige Ch. (N. Y.) 49. See *Denton v. Nanny*, 8 Barb. (N. Y.) 618; *Wheeler v. Morris*, 3 Bosw. (N. Y.) 534; *Titus v. Neilson*, 5 John. Ch. (N. Y.) 452.

⁷⁰ 95 Mass. (13 Allen) 60, 90 Am. Dec. 177.

has not been allowed to redeem from a mortgage in which she had joined with her husband, and this is thought to be true at common law, but under the statutes in many of the states it has been repeatedly held that a foreclosure, in the mode provided by statute, of a mortgage in which the wife joined with her husband to release her dower, or in case the husband had only been seized of an equity of redemption during coverture, bars the right of dower,⁷¹ even though the wife is not made a party to the suit.⁷² Upon general principles of equity it is difficult to find a reason why an inchoate right of dower should not be protected against extinguishment by the foreclosure of a mortgage; especially where the husband had parted with his whole estate in the land, and can no longer be regarded as in any sense representing the interests of the wife. Coverture is no bar to the maintenance of a suit in equity; and it is the policy of our legislation to permit married women to assert, protect and sue for their separate rights of property.⁷³

But a tenant in dower, who seeks to maintain a bill in equity to redeem land from a mortgage made by her husband and herself, must first offer to pay the whole amount due on the mortgage.⁷⁴ The reason for this rule is the fact that the widow has a right to surplus only of proceeds of mortgaged premises, where she joined in the mortgage of her husband's land for his debt and the land is sold on foreclosure.⁷⁵

⁷¹ *Davis v. Wetherell*, 95 Mass. (13 Allen) 60, 90 Am. Dec. 177.

⁷² *Pitts v. Aldrich*, 93 Mass. (11 Allen) 39; *Farwell v. Cotting*, 90 Mass. (8 Allen) 211; *Savage v. Hall*, 78 Mass. (12 Gray) 363; *Wedge v. Moore*, 60 Mass. (6 Cush. 8.

⁷³ *Davis v. Wetherell*, 95 Mass. (13 Allen) 60, 90 Am. Dec. 177.

⁷⁴ *McCabe v. Bellows*, 93 Mass. (7 Gray) 148, 66 Am. Dec. 467.

See *Brown v. Lapham*, 57 Mass. (3 Cush.) 554; *Eaton v. Simonds*, 31 Mass. (14 Pick.) 98; *Gibson v. Crehore*, 22 Mass. (5 Pick.) 151, 153 See *post*, § 1134.

⁷⁵ *Matthews v. Duryee*, 4 Keyes (N. Y.) 535, 3 Abb. Ap. Dec. 221; *House v. House*, 10 Paige Ch. (N. Y.) 165; *Hawley v. Bradford*, 9 Paige Ch. (N. Y.) 200, 37 Am. Dec. 390.

It is said, however, that the wife's inchoate right of dower in lands which are sold under foreclosure during the lifetime of her husband is extinguished, and in such a case she will not be entitled to redeem.⁷⁶

§ 1127. **Tenant for life.**—It is said by the supreme judicial court of Massachusetts, in the case of *Lanson v. Drake*,⁷⁷ that a tenant for life of land, on which there is a mortgage overdue, cannot hold possession of the land against the mortgagee by paying interest as it accrues; neither can he, by paying the amount of the mortgage, compel the mortgagee to assign it to him;⁷⁸ but a bill brought for the purpose may be maintained as a bill to redeem in those cases where the plaintiff alleges his willingness to pay the amount due on the mortgage.⁷⁹

§ 1128. **Tenant for years.**—A person in possession as tenant for years of lands mortgaged by his lessor, has such an interest therein as will entitle him to redeem from the mortgage lien.⁸⁰ The court of chancery of New Jersey, in

⁷⁶ *Newhall v. Lynn Five Cent Bank*, 101 Mass. 432, 3 Am. Rep. 387; *Frost v. Peacock*, 4 Edw. Ch. (N. Y.) 678, 695; *Matthews v. Duryee*, 4 Keyes (N. Y.) 540, 3 Abb. Ap. Dec. 221; *Titus v. Neilson*, 5 John. Ch. (N. Y.) 452; *Bell v. Mayor, etc. of New York*, 10 Paige Ch. 49; *Hawley v. Bradford*, 9 Paige Ch. 200, 37 Am. Dec. 390.

⁷⁷ 105 Mass. 564. See *Rafferty v. King*, 1 Keen, 618; *Ravald v. Russell*, 1 Younge, 19.

⁷⁸ But see *Atwood v. Charlton*, 21 N. Y. 568, 45 Atl. 580.

⁷⁹ See *Lamb v. Montague*, 112 Mass. 352; *Aynsly v. Reed*, 1 Dick. 249; *Evans v. Jones*, 1 Kay, 29; *Wickes v. Scrivne*, 1 John. & H. 215; *Kerse v. Miller*, 169 Mass. 44,

47 N. E. 504. See also *Downing v. Hartshorn*, 69 Neb. 364, 111 Am. St. Rep. 550, 95 N. W. 801.

⁸⁰ *McDermott v. Burke*, 16 Cal. 580; *Davis v. Wetherell*, 95 Mass. (13 Allen) 60, 90 Am. Dec. 177; *Clary v. Owen*, 81 Mass. (15 Gray) 521; *Loud v. Lane*, 49 Mass. (8 Met.) 517, 519; *Bacon v. Bowdoin*, 39 Mass. (22 Pick.) 401, 404, 43 Mass. (2 Met.) 591; *Mayo v. Fletcher*, 31 Mass. (15 Pick.) 525; *Hamilton v. Dobbs*, 19 N. J. Eq. (4 C. E. Gr.) 227; *Arnold v. Green*, 116 N. Y. 572, 23 N. E. 1; *Willing v. Reyerson*, 94 N. Y. 103; *Averill v. Taylor*, 8 N. Y. 44; *Lane v. King*, 8 Wend. (N. Y.) 584, 24 Am. Dec. 105; *Keech v. Hall*, 1 Doug. 21, 2 Smith Lead. Cas. (9th Am. ed.)

the case of *Hamilton v. Dobbs*,⁸¹ say that a tenant for years who pays off a mortgage debt is not entitled to demand a written assignment of the bond and mortgage, but that after redemption he stands in the place of the mortgagee, and will be subrogated to his rights against the mortgagor and of those claiming under him. He will have the right to require the bond and mortgage to be delivered to him uncanceled, and this, in such a case, is in equity, and may be at law, a complete assignment.⁸²

§ 1129. **Tenant in common.**—A tenant in common of mortgaged lands may redeem from the mortgage lien in order to protect his interest where he has not been guilty of laches, or otherwise estopped;⁸³ but he will not thereby acquire a right to the whole estate to the exclusion of his co-tenants, and should he take to himself a transfer of the legal title the share of the mortgage which it belonged to him to pay becomes extinguished and his title in his own portion of the land will be perfected; but as to the residue he becomes subrogated to the rights of the mortgagee and can call upon his co-tenants to contribute their share or be foreclosed of their right to redeem.⁸⁴

In the case of *Crafts v. Crafts*,⁸⁵ where one tenant in common of real estate conveyed to two, paid his half of the purchase money, and joined with his co-tenant in a note and mortgage to secure the payment of the other half, and afterwards released his interest on the land to the mortgagee,

823; *Kebabian v. Shinkle*, 26 R. I. 505, 59 Atl. 743.

⁸¹ 19 N. J. Eq. (4 C. E. Gr.) 227.

⁸² As to assignment of mortgage on redemption. See *ante*, § 1035.

⁸³ *Norton v. Sharp*, 53 Mich. 146, 18 N. W. 601.

⁸⁴ *Young v. Williams*, 17 Conn. 398; *McSorley v. Lindsay*, 62 Wash.

203, 113 Pac. 267. See *Simonson v. Lauck*, 105 App. Div. 82, 93 N. Y. Supp. 965; *Harding v. Gillett*, 25 Okl. 199, 107 Pac. 665; *McQueen v. Whetstone as adm'r, etc.* 127 Ala. 417, 30 So. 548. See also *Dougherty v. Kubat*, 67 Neb. 269, 93 N. W. 317; *Green v. Walker*, 22 R. I. 14, 45 Atl. 742.

⁸⁵ 79 Mass. (13 Gray) 360.

the supreme judicial court of Massachusetts held that his cotenant, or one claiming under him with notice of the facts, could not redeem the estate without paying the full amount of the mortgage.⁸⁶

§1130. Tenant in tail.—It is thought that the case of *Playford v. Playford*⁸⁷ is authority for the proposition that a tenant in tail has such an interest in the lands as will entitle him to redeem from a mortgage lien; but this estate is of such rare occurrence in this country that the proposition has more theoretical than practical importance.

§ 1131. Title Insurance Company—May not redeem, when.—It is held that a title insurance company which has insured the title of certain parties to land derived through a foreclosure sale has not such an interest in the land, within the meaning of the New York statute,⁸⁸ as to entitle it to be made a party defendant in an action to redeem from the lien of the mortgage, where there is no charge of misconduct against the insured, and it will give the company an unfair opportunity to protect its interests without being defendant.⁸⁹

§ 1132. Trustee of absent debtor.—It has been held that the trustee of an absent debtor has such an interest in the land as will entitle him, under certain circumstances, to redeem from the lien of the mortgage.

§ 1133. Wife joining in mortgage.—We have already seen⁹⁰ that the wife's right of inchoate dower in mortgaged lands is a sufficient title to enable her to redeem them from

⁸⁶ See *Lyon v. Robbins*, 45 Conn. 518; *Seymour v. Davis*, 35 Conn. 264; *Kingbury v. Buckner*, 70 Ill. 514; *Craithers v. Stuart*, 87 Ind. 424; *Laylin v. Knox*, 41 Mich. 40, 1 N. W. 913; *Wynne v. Styan*, 2 Phil. Ch. 306.

⁸⁷ 4 Hare, 546.

⁸⁸ N. Y. Code Civ. Proc. § 452

⁸⁹ *Russ v. Stratton*, 8 Misc. (N. Y.) 6, 28 N. Y. Supp. 392, 59 N. Y. S. R. 384.

⁹⁰ See *ante*, § 1126.

the lien of the mortgage.⁹¹ It has been said that a wife who, solely to relinquish her right of dower and homestead joined with her husband in a deed of lands conveyed to them by entireties and not by moieties, is not estopped from redeeming from a previous mortgage thereon, notwithstanding her agreements and admissions, made under her misapprehension as to her right of property, and without intent to deceive.⁹² And where a wife who is a part owner of the mortgaged premises is not made a party to an action to foreclose, she will be entitled to redeem, although her husband was made a party and his right in the remainder of the land foreclosed.⁹³

The supreme court of Michigan, in the recent case of *Moore v. Smith*,⁹⁴ say that a wife holding a homestead and dower-right is entitled not only to redeem from a mortgage on the homestead, of which a statutory foreclosure has been had, but to have an assignment thereof upon payment to the mortgagee of the amount bid at the sale, although she has made no tender of the amount due, where it has been foreclosed by notice published in an obscure village paper, instead of in the city where the property is situated, and the mortgagee has, by every effort in his power, aided by the husband, attempted to prevent her from raising the money

⁹¹ *Frain v. Burgett*, 152 Ind. 55, 50 N. E. 873, 52 N. E. 395. See *McMichael v. Russell*, 68 App. Div. 104, 74 N. Y. Supp. 212; *Northwestern Trust Co. v. Ryan*, 115 Minn. 143, 132 N. W. 202; *Roberts v. Fleming*, 53 Ill. 196; *Vaughan v. Dowden*, 126 Ind. 406, 26 N. E. 74; *Pierce v. Chance*, 108 Mass. 254; *Anthony v. Pierce*, 108 Mass. 251; *Moore v. Smith*, 95 Mich. 71, 54 N. W. 701; *Williams v. Stewart*, 25 Minn. 516; *Green v. Dixon*, 9 Wis. 532.

⁹² *Pierce v. Chance*, 108 Mass. 254; *Anthony v. Pierce*, 108 Mass. 251.

⁹³ *Green v. Dixon*, 9 Wis. 532.

A wife is entitled, under a statute giving the right to redeem to anyone who has an undivided interest in the real estate, during the life of her husband, to redeem his lands from a sale made on foreclosure of a mortgage made by him thereon in which she joined, and to the proceedings to foreclose to which she was a party. *Vaughan v. Dowden*, 126 Ind. 406, 26 N. E. 74.

⁹⁴ 95 Mich. 71, 54 N. W. 701.

to acquire his interest or redeem from the foreclosure sale, and succeeded in preventing her from using the property, and in taking away from her other property which she had, and forcing her to institute a lawsuit to retain her personal property.⁹⁵

The supreme judicial court of Massachusetts, in the case of *Lamb v. Montague*,⁹⁶ say that where one's equity of redemption has been sold by his assignee in bankruptcy, the mortgagor and his wife having a homestead, and she an inchoate right of dower in the mortgaged premises, they may maintain a bill to redeem, although not entitled to an assignment of the mortgage. And it has also been held that the wife has the right to redeem although her husband is still alive and her right of dower inchoate only.⁹⁷

§ 1134. **Widow may redeem.**—Where a wife joins with her husband in the execution of a mortgage on his land, her rights and interests remaining in the land are such as to render it proper that she should be made a party to the foreclosure of the mortgage; and if she is not made a party

⁹⁵ In *Roberts v. Fleming*, 53 Ill. 196, while the right of redemption from a mortgage still existed, a junior mortgagee executed an agreement by which he agreed to sell and convey all his interest in the mortgaged premises for a certain sum, but payment was not to be made unless the right of the party purchasing, or his assigns, to redeem from the senior mortgage, should be established. This agreement was assigned to the wife of the mortgagor. Then the mortgagor and his wife executed a quitclaim deed for the premises, and the grantee therein released to the wife of the mortgagor. Court held that the wife thereby became invested

with the right to redeem from the senior mortgage, and that upon bill filed for redemption, by the party so invested with the right to redeem, the junior mortgagee should be made a party, because the terms of the agreement by which he transferred his interest remained unexecuted, leaving equities to be settled between him and the party with whom he contracted. Had he executed a deed, he would not have been a necessary party.

⁹⁶ 112 Mass. 352.

⁹⁷ *Mackenna v. Fidelity Trust Co. of Buffalo*, 184 N. Y. 411, 3 L.R.A. (N.S.) 1068, 112 Am. St. Rep. 620, 77 N. E. 721.

the foreclosure stands for nothing as against her.⁹⁸ In such a case the wife, after the death of her husband, may redeem,⁹⁹ but she can do so only by paying the whole mortgage debt, and not merely upon repayment of the price paid by the purchaser, where that price is less than the amount of the mortgage debt.¹ A widow in possession of a portion of the mortgaged premises, as dowress under her right of quarantine is entitled to have her estate protected by redeeming from the mortgage.²

⁹⁸ *McGough v. Sweetzer*, 97 Ala. 361, 12 So. 162, 19 L.R.A. 470. See *Eslava v. Lepretre*, 21 Ala. 504, 56 Am. Dec. 266; *Dough v. McLoskey*, 1 Ala. 78; *Leonard v. Villars*, 23 Ill. 377; *Gibbery v. Maggord*, 2 Ill. 471; *Gibson v. Crehore*, 22 Mass. (5 Pick.) 151; *Miles v. Voorhies*, 20 N. Y. 412, 10 Abb. (N. Y.) Pr. 152; *Denton v. Nanny*, 8 Barb. (N. Y.) 618; *McArthur v. Franklyn*, 15 Ohio St. 485, 16 Ohio St. 193.

⁹⁹ See *Hiller v. Nelson*, 118 S. W. 292 (Ky.); *Hays v. Cretin*, 102 Md. 695, 4 L.R.A.(N.S.) 1039, 62 Atl. 1028. But see *Robbins v. Brown*, 151 Ala. 236, 44 So. 63; *Gandy v. Tippet*, 155 Ala. 296, 46 So. 463.

¹ *McGough v. Sweetzer*, 97 Ala. 361, 12 So. 162, 19 L.R.A. 470. See *McCabe v. Bellows*, 73 Mass. (7 Gray) 148, 66 Am. Dec. 467; *Newton v. Cook*, 70 Mass. (4 Gray) 46; *Gibson v. Crehore*, 22 Mass. (5 Pick.) 151; *Chiswell v. Morris*, 14 N. J. Eq. (1 McCar.) 101; *Denton v. Nanny*, 8 Barb. (N. Y.) 618; *Wheeler v. Morris*, 2 Bosw. (N.

Y.) 524; *Ross v. Boardman*, 22 Hun (N. Y.) 527; *McArthur v. Franklyn*, 16 Ohio St. 193; *Collins v. Riggs*, 81 U. S. (14 Wall.) 491, 20 L. ed. 723.

On a bill to redeem, brought by the mortgagor's widow in order to be let into her dower, the mortgagee is liable to account to her for the rents and profits received from the date of his entry into possession under the mortgage, and not merely from the date of her demand. *Dela v. Stanwood*, 62 Me. 574.

Where the estate of a decedent has been declared insolvent, and property has been set apart to his widow as a homestead, within the prescribed time, she has no right of redemption from a sale of such property under a mortgage given by her husband and herself while the property was being used as a family homestead. *Walden v. Speigner*, 87 Ala. 379, 6 So. 80.

² *Merselis v. Van Riper*, 55 N. J. Eq. 618, 38 Atl. 196.

CHAPTER XL.

REDEMPTION—TIME OF REDEMPTION.

- § 1135. In general.
- § 1136. Before maturity.
- § 1137. After maturity—Before foreclosure.
- § 1138. Same—Same—When mortgagor remains in possession.
- § 1139. After foreclosure—Generally.
- § 1140. Same—After lapse of years.
- § 1141. Same—Computation of time.
- § 1142. Same—By junior lienholder.
- § 1143. Same—Receipt of rents and profits by mortgagee—Effect on right.
- § 1144. Same—Fraud—Effect on redemption.
- § 1145. Extension of time to redeem—By agreement of parties.
- § 1146. Same—By court on statutory foreclosure.
- § 1147. Same—By court of equity, when.
- § 1148. Same—Disability of infancy, imprisonment or insanity.
- § 1149. Where mortgagee purchases at foreclosure sale.

§ 1135. **In general.**—The time within which redemption may be made from the lien of a mortgage is regulated by statute in most, if not all, the states. There is a sad want of uniformity in these statutory provisions. Under some statutes a certain time must elapse after default before proceedings in foreclosure can be commenced; under some a specified time (varying in almost every statute) is given within which to redeem after proceedings in foreclosure are instituted; under some no sale can be made of the mortgaged premises for a specified length of time (also varying) after the decree of foreclosure is entered; under some a sale, when properly made and confirmed, cuts off all right of redemption and vests the property absolutely in the purchaser; and under others a specified time (not uniform in length) after sale is given in which redemption may be made. Whatever the provision of

the statute, it must be strictly complied with by the party seeking to redeem.³

³ See *Wood v. Holland*, 53 Ark. 69, 13 S. W. 739; *Collins v. Scott*, 100 Cal. 446, 34 Pac. 1082; *McIlwain v. Karstens*, 152 Ill. 135, 38 N. E. 555; *Sutterlin v. Connecticut Mut. L. Ins. Co.* 90 Ill. 483; *Munn v. Buyer*, 70 Ill. 604; *McCagg v. Heacock*, 34 Ill. 476, 85 Am. Dec. 327; *Lynch v. Jackson*, 28 Ill. App. 160; *Lindsey v. Delano*, 78 Iowa. 350, 43 N. W. 218; *Hurn v. Hill*, 70 Iowa, 38, 29 N. W. 796; *Sterling Mfg. Co. v. Early*, 69 Iowa, 94; 28 N. W. 458; *Wakefield v. Rotherham*, 67 Iowa, 444, 25 N. W. 697; *Gargon v. Gargon*, 47 Iowa, 180; *Mayer v. Farmers' Bank*, 44 Iowa, 212; *Crawford v. Taylor*, 42 Iowa, 260; *Flucher v. Hiatt*, 23 Iowa, 327, 90 Am. Dec. 440; *Sheldon v. Pruessner*, 52 Kan. 593, 35 Pac. 204; *Henkel v. Mix*, 38 La. An. 271; *Emmons v. Van Zee*, 78 Mich. 171, 43 N. W. 1100; *Newman v. Locke*, 66 Mich. 27, 66 N. W. 27; *McHugh v. Wells*, 39 Mich. 175; *Gates v. Ege*, 57 Minn. 465, 59 N. W. 495; *Parsons v. Noggle*, 23 Minn. 328; *Carroll v. Rossiter*, 10 Minn. 174; *Gordon v. Lewis*, 88 Mo. 378; *Reilly v. Phillips*, 4 S. D. 604, 57 N. W. 780; *Connecticut Mut. L. Ins. Co. v. Cushman*, 108 U. S. 51, 27 L. ed. 648, 2 Sup. Ct. Rep. 236; *Mason v. Northwestern Mut. L. Ins. Co.* 106 U. S. 163, 27 L. ed. 129, 1 Sup. Ct. Rep. 165; *Burley v. Flint*, 105 U. S. 247, 26 L. ed. 986; *Swift v. Smith*, 102 U. S. 442, 26 L. ed. 986; *Orvis v. Powell*, 98 U. S. 176, 25 L. ed. 238; *Allis v. Northwestern Mut. L. Ins. Co.* 97 U. S. 144, 24 L. ed. 1008; *Birne v. Hart-*

ford Fire Ins. Co. 96 U. S. 677, 24 L. ed. 858; *Howard v. Bugbee*, 65 U. S. (24 How.) 461, 16 L. ed. 753; *Simmons v. Taylor*, 38 Fed. 682; *Blair v. Chicago, etc. R. Co.* 12 Fed. 750; *National Permanent Mut. Benef. Bldg. Soc. v. Paper*, (1892) 1 Ch. 54.

In *Alabama* two years is given by statute in which to redeem. *Drum & Ezekiel v. Bryan*, 145 Ala. 686, 40 So. 131. (Code 1896, § 3505.)

In *Arkansas* the time within which to redeem is one year, whether the debt be for purchase money or otherwise. *Wood v. Holland*, 53 Ark. 69, 13 S. W. 739.

In *California* redemption from sale made under valid foreclosure proceedings is restricted to six months by Code Civ. Proc. § 702, *Collins v. Scott*, 100 Cal. 446, 34 Pac. 1082.

In *Illinois* the owner of a claim allowed against an estate must take the special execution provided for in Ill. Stat. chap. 77, 27, within seven years from the time the claim is allowed, in order to redeem from a foreclosure sale of land of the deceased debtor. *McIlwain v. Karstens*, 152 Ill. 135, 38 N. E. 555.

In *Iowa*, in the case of *Wakefield v. Rotherham*, 67 Iowa, 444, 25 N. W. 697, the owner of land sold to the county on foreclosure of a school fund mortgage in Iowa, paid to the clerk, to redeem the amount demanded by the clerk supposing that he was paying all that was due, while in fact the amount was a few dollars short. The court held that after the year allowed by

the statute for redemption, he could pay the balance and redeem, although the purchaser had obtained a sheriff's deed on his certificate of purchase.

In *Michigan* the right of redemption from foreclosure sale under advertisement is defeated by gross laches. *Emmons v. Van Zee*, 78 Mich. 171, 43 N. W. 1100.

Under Act No. 200, Pub. Acts 1899, §§ 111, 118, redemption must be made within six months from the time of sale. *Trombley v. Klersy*, 147 Mich. 370, 110 N. W. 940.

In *Minnesota* one year in which to redeem is given by the statute (Minn. Gen. Stat. 1878, c. 81, §§ 13, 14) and an action to redeem will be dismissed where it clearly appears to the court that the plaintiff has permitted the period fixed by statute to elapse before commencing proceedings. *Gates v. Ege*, 57 Minn. 465, 59 N. W. 495; *Parsons v. Naggle*, 23 Minn. 328; *Allis v. Northwestern Mut. L. Ins. Co.* 97 U. S. 144, 24 L. ed. 1008.

The supreme court in the case of *Parsons v. Naggle*, 23 Minn. 328, say that the time within which an action to redeem must be brought is, in analogy of the statute of limiting the time for commencing an action to foreclose, is ten years; and the time for the mortgagor to bring his action to redeem is not extended by the fact that, owing to the mortgagor being out of the state, the mortgagee may bring his action to foreclose after ten years.

Under this statute it is said that a decree ordering the master, or making a sale, to deliver to the purchaser a certificate that, unless the property is redeemed within twelve

months after the sale, he will be entitled to a deed, gave substantial effect to the equity of redemption secured by the statute, although the court intended to defer the order confirming the sale until the end of the twelve months. *Allis v. Northwestern Mut. L. Ins. Co.* 97 U. S. 144, 24 L. ed. 1008.

In *Missouri* the statute of limitations applies to suits to redeem. *Gordon v. Lewis*, 88 Mo. 378. The time usually allowed by a court of equity is six months. *Stephenson v. Kilpatrick*, 166 Mo. 262, 65 S. W. 773.

In *New York* under the code (§ 379) 20 years is the limitation of a suit to redeem from the grantee of a mortgagee who purchased at the foreclosure sale, with a possible addition of only one year in the case of infancy (§ 396) or of five years in case of insanity or imprisonment. *Messinger v. Foster*, 115 App. Div. 689, 101 N. Y. Supp. 387.

In *New York* where a deed is given with the privilege to the grantors of repurchasing or redeeming within three years by paying all indebtedness, the privilege is not extinguished by failure to exercise it within the period specified. *Conover v. Palmer*, 123 App. Div. 817, 108 N. Y. Supp. 480.

In *South Dakota*—Minor liens shown no favors. The court, in *Reilly v. Phillips*, 4 S. D. 604, 57 N. W. 780, say that in the absence of any statutory exception in favor of minor heirs, giving them other or further rights than are given by the statute (Dak. Comp. L. 5421) fixing a definite time for redemption after sale under a power contained in a real estate mortgage, no

In the absence of any statute regulating, it rests in the sound discretion of a court of equity, governed by the equities of each case, to name the time within which it will let in a party to a mortgage foreclosure to redeem.⁴ The party seeking to redeem from an equitable mortgage cannot object to the shortness of the time fixed by the court, for the reason that he is regarded as bringing in and tendering the amount

relief can be granted such heirs after the time for redemption has expired.

Widows are excepted from the general rule in some states. Thus the supreme court of Indiana, in the case of *Bar v. Valentine*, 120 Ind. 590, 22 N. E. 965, say that widow is entitled to fifteen years from the death of her husband in which to redeem from a foreclosure of a mortgage given by her husband alone for the purchase price of land, and foreclosed in his lifetime, where she was not made a party; and she is not bound to make a demand or tender as a condition precedent to bringing an action to redeem.

⁴ *Hanna v. Davis*, 112 Mo. 599, 20 S. W. 599. See *Burgess v. Ruggles*, 146 Ill. 506, 34 N. E. 1036; *Bremer v. Calumet & C. Canal & D. Co.* 127 Ill. 464, 18 N. E. 321; *Decker v. Patton*, 120 Ill. 464, 11 N. E. 897, aff'g 20 Ill. App. 210; *Moynusson v. Charlson*, 32 Ill. App. 580; *Gleiser v. McGregor*, 85 Iowa, 489, 52 N. W. 306; *Flanders v. Hall*, 159 Mass. 95, 34 N. E. 178; *Mules v. Stehle*, 22 Neb. 740, 36 N. W. 142; *Smith v. Hesketh*, L. R. 44 Ch. Div. 161; *Mahaffy v. Faris*, 144 Iowa, 220, 24 L.R.A.(N.S.) 840, 122 N. W. 934. See also *Williams v. Bolt*, 136 N. W. 472.

In Illinois the time usually adopt-

ed is six months (*Bremer v. Calumet & C. Canal & D. Co.* 127 Ill. 464, 18 N. E. 321; *Decker v. Patton*, 120 Ill. 464, 11 N. E. 897, aff'g 20 Ill. App. 210), but the time rests in the sound discretion of the court in view of all of the circumstances. *Bremer v. Calumet & C. Canal & D. Co.* 127 Ill. 464, 18 N. E. 321.

In Iowa it is held that six months is a reasonable time within which redemption may be made where occupied and held by another as security for a debt. *Gleiser v. McGregor*, 85 Iowa, 489, 52 N. W. 366.

In Nebraska it is said that where a purchaser in good faith under a decree of foreclosure of a senior mortgage files a bill to require a junior incumbrancer, not a party to the action, to redeem within a day to be named, or be barred of the right, and it does not appear that the premises, if sold, would satisfy the liens prior to that of the junior incumbrance, a decree of strict foreclosure may be rendered requiring such junior incumbrancer to redeem the prior incumbrances within a reasonable time, to be named in the decree, or be barred of the right of redemption. *Miles v. Stehle*, 22 Neb. 740, 36 N. W. 142.

In New Hampshire a year is the time usually fixed. *Murphy v. New*

that shall be found due.⁵ Hence a decree passing upon certain questions and effectually foreclosing certain mortgages, fixing the time within which the redemption shall take place, effectually bars an action brought after such time by the parties or their privies, in which the same matters are presented.⁶ Should the party, through his own carelessness, fail to know the time within which redemption is to be made he is not entitled to relief in equity.⁷ Thus, it has recently been held by the supreme court of Illinois, in the case of *Burgess v. Ruggles*,⁸ that a mortgagor who fails to execute a right given him by a decree against a voidable sale, allowing him to redeem within a certain time, loses all right of redemption, and cannot secure such right by having a decree in behalf of a purchaser under levy upon his supposed interest adjudged to be in his favor and for his benefit. It is said in *Kalscheuer v. Upton*,⁹ that a provision as to the redemption from prior lien-

Hampshire Savings Bank, 63 N. H. 362.

In *England*, where the plaintiffs in a foreclosure action were first and third mortgagees, and the second incumbrancer was a jointress, and there were several subsequent mortgagees, an order was made giving the jointress six months to redeem; in case she did redeem, giving three months to the plaintiffs, as third mortgagees, to redeem subject to the jointure, and a third period of three months to the subsequent incumbrancers; but if she did not redeem, giving them a second period only of three months. *Smithett v. Hesketh*, L. R. 44 Ch. Div. 161.

⁵ *Hagmusson v. Charlson*, 32 Ill. App. 580.

⁶ *Flanders v. Hall*, 159 Mass. 95, 34 N. E. 178. See *Burgess v. Ruggles*, 146 Ill. 506, 34 N. E. 1035; *Francis v. Parks*, 55 Vt. 80; *Parker*

v. Oacres, 130 U. S. 43, 32 L. ed. 848, 9 Sup. Ct. Rep. 433.

⁷ *Francis v. Parks*, 55 Vt. 80. See *Burgess v. Ruggles*, 146 Ill. 506, 34 N. E. 1035; *Parker v. Oacres*, 130 U. S. 43, 32 L. ed. 848, 9 Sup. Ct. Rep. 433.

A court of equity should refuse aid, say the United States supreme court, in the case of *Parker v. Oacres*, *supra*, to a party asserting under the state of Washington Territory, a right of redemption, who has neglected, without sufficient cause, before the expiration of six months from the confirmation of the sale, to invoke the authority of the proper court or judge to compel the recognition of such right by the officer whose duty it was, under the statute, to accept a tender made in conformity with the law.

⁸ 146 Ill. 506, 34 N. E. 1035.

⁹ 43 N. W. 816.

holders "at any time after the claim is due," is for their benefit, and can be waived by them if they choose to do so by accepting payment of claims before they are due.

§ 1136. **Before maturity.**—The general rule is that the right of redemption cannot be enforced until the mortgage debt is due,¹⁰ and this is true even though the interest for the full time be paid or tendered,¹¹ unless by the terms of the instrument the debt is made payable "at or before" a certain day, in which case redemption may be made at any time.¹² In such a case the mortgagor cannot be compelled to keep the money and pay interest until the day specified by the mortgage.¹³

But the supreme court of Iowa, in the case of *Wheeler v. Menold*,¹⁴ say that a junior mortgagee of lands, who was ignorant when he took his mortgage that the payment of debts secured by senior mortgages had been extended after maturity, can enforce his right to redeem and foreclose before the maturity of the debts under the new contract, as he is not bound by the contract of extension.

§ 1137. **After maturity—Before foreclosure.**—The right to redeem being a right to pay the debt and have the lien discharged, it is thought that this may be done at any time before foreclosure;¹⁵ but this is a matter controlled almost

¹⁰ See *Abbe v. Goodwin*, 7 Conn. 377; *Saunders v. Frost*, 22 Mass. (5 Pick.) 267, 16 Am. Dec. 394; *Kingman v. Pierce*, 17 Mass. 247; *In re John. & Cherry Sts.* 19 Wend. (N. Y.) 659; *Moore v. Cord*, 14 Wis. 213; *Brown v. Cole*, 14 Sim. 426, 14 L. R. (N. S.) Ch. 168.

¹¹ The reason for this rule has been said to be because mortgagees generally advance their money as an investment, and, if mortgagors were allowed to pay off their mort-

gage money at any time after the execution of the mortgage, it might be attended with extreme inconvenience to mortgagees. *Brown v. Cole*, 14 L. J. (N. S.) Ch. 168.

¹² *In re John. & Cherry Sts.* 19 Wend. (N. Y.) 659.

¹³ *In re John. & Cherry Sts.* 19 Wend. (N. Y.) 659.

¹⁴ 81 Iowa, 647, 47 N. W. 871.

¹⁵ Right of redemption continues until the sale. *Atwood v. Carmer*, 75 N. J. Eq. 319, 73 Atl. 114.

entirely by local statutes, the provisions of which must be looked to in each instance.¹⁶ Thus, in California,¹⁷ the mortgagor is entitled to redeem at any time after the principal obligation becomes due, regardless of the statute of limitations.¹⁸ And in Massachusetts,¹⁹ under a mortgage with a power of sale, the mortgagor may, after breach of the condition but before a sale without a previous tender, bring a bill in equity to redeem the land, offering in it to pay what is due.²⁰ The North Dakota statute²¹ provides that every person having an interest in property subject to a lien has a right to redeem it from the lien at any time after the claim is due, and before his right of redemption is foreclosed.²²

§ 1138. Same—Same—When mortgagor remains in possession.—It is thought that the right of redemption is not lost by lapse of time when the mortgagor remains in possession, and occupies for himself and not for the mortgagee. This doctrine was laid down by the supreme judicial court of Maine, in the case of *Bird v. Keller*,²³ and the court say: "It is, however, claimed that the right of redemption is barred by lapse of time, which, under a certain state of facts, might occur. So a lapse of time of sufficient length would raise a presumption of payment. But both these facts do not exist in relation to the same mortgage at the same time. Whether the one or the other will prevail, must depend upon the possession. If the mortgagor were in possession for twenty years after the debt became payable, the presumption of payment would follow. Perhaps the same result might follow if the mortgagee were not in possession. But if the

¹⁶ See *Parker v. Dacres*, 130 U. S. 43, 32 L. ed. 848, 9 Sup. Ct. Rep. 433.

¹⁷ Under Cal. Civ. Code, § 2903.

¹⁸ *Hall v. Arnott*, 80 Cal. 348, 22 Pac. 500.

¹⁹ Under Mass. Pub. St. c. 181, § 27.

²⁰ *Way v. Mullett*, 143 Mass. 49.

²¹ Rev. Codes 1905, § 6141.

²² *North Dakota Horse & Cattle Co. v. Serumgard*, 17 N. D. 466, 29 L.R.A.(N.S.) 508, 138 Am. St. Rep. 717, 117 N. W. 453.

²³ 77 Me. 270, 273.

mortgagee were in possession for the same length of time, there would be a presumption of foreclosure. From the report in this case it appears that the * * * mortgagee continued to hold and occupy as before; taking the rents and profits without accounting for them or paying rent, or being called upon to do either. * * * Thus, for twenty years after the attempted foreclosure, the premises were in the actual possession of one of the mortgagors, which would not only prevent the completion of the foreclosure, but raises the presumption of payment."

§ 1139. After foreclosure—Generally.—When the mortgagor is permitted to redeem after foreclosure, it will be only upon the full payment of the mortgage debt, interest and costs; and not upon repayment merely of the amount for which the premises sold, in those cases where they bring less than the full amount of the mortgage debt.²⁴

The redemption law in force at the time of the rendition of a judgment foreclosing a mortgage, governs in respect to the time within which the redemption may be made, and not the law in force at the time of the attempted redemption.²⁵ But the existing laws with reference to which the mortgagor and mortgagee must be assumed to have contracted, are those only which, in their direct or necessary legal operation, controlled or affected the obligation of their contract, and do not include laws changing the rate of interest on bids to be paid, upon redemption, to the purchaser at foreclosure sale.²⁶ It has been said that a state statute which allows the mortgagor twelve months to redeem after a sale on foreclosure, and his

²⁴ *Horn v. Indianapolis Nat. Bank*, 125 Ind. 381, 25 N. E. 558, 9 L.R.A. 676, 21 Am. St. Rep. 231; *Duke v. Beeson*, 79 Ind. 24; *Johnson v. Harrison*, 19 Iowa, 56; *Powers v. Golden Lumber Co.* 43 Mich. 468, 5 N. W. 656; *Martin v. Fridley*, 23 Minn. 13; *Raynor v. Selmes*,

52 N. Y. 579; *Collins v. Riggs*, 81 U. S. (14 Wall.) 491, 20 L. ed. 723. See *post*, §§ 1173, 1191, 1192.

²⁵ *Sheldon v. Pruessner*, 52 Kan. 593, 35 Pac. 204.

²⁶ *Connecticut Mut. L. Ins. Co. v. Cushman*, 108 U. S. 51, 27 L. ed. 648.

judgment creditor three months after that, governs to that extent the mode of transferring the title, and confers a substantial right, and thereby becomes a rule of property.²⁷ That the Statute of Limitations applies to a suit to redeem is well settled; and a mortgagee in possession, resisting enforcement by the mortgagor of the equity of redemption, for the period of limitation will bar enforcement by the mortgagor of his equity of redemption.²⁸

§ 1140. **Same—After lapse of years.**—It is thought that persons seeking to enforce the right, after the lapse of many years and the intervention of other interests, to redeem property notwithstanding a sale under the foreclosure of prior mortgages, must have substantial merit in their cause, and come before the court with clean hands.²⁹ The time within which an action to redeem must, as a general rule, be brought, is, in analogy to the statute limiting the time for commencing an action to foreclose, for the statute of limitations³⁰ applies to suits to redeem.³¹ As a usual thing such suits cannot be maintained after ten years from the date when the right of action accrued,³² and in no state after twenty years of peaceable and adverse possession.³³ And the time within which the mortgagor may bring his action to redeem is not extended by the fact that, owing to the mortgagor being out of the state,

²⁷ *Brine v. Hartford Fire Ins. Co.* 96 U. S. 627, 24 L. ed. 858.

²⁸ *Gordon v. Lewis*, 88 Mo. 378.

²⁹ *Simmons v. Taylor*, 38 Fed. 682.

³⁰ See *post*, § 1249.

³¹ See *Munn v. Burges*, 70 Ill. 604; *Crawford v. Taylor*, 42 Iowa, 260; *Parsons v. Naggle*, 23 Minn. 328; *Gordon v. Lewis*, 88 Mo. 378; *Turpie v. Lowe*, 158 Ind. 314, 92 Am. St. Rep. 310, 62 N. E. 484.

But see *Fitch v. Miller*, 200 Ill. Mortg. Vol. II.—97.

170, 65 N. E. 650; *Gunter v. Smith*, 113 Ga. 18, 38 S. E. 374.

³² *Crawford v. Taylor*, 42 Iowa, 260. See *Munn v. Burges*, 70 Ill. 604, 661; *Horton v. Murden*, 117 Ga. 72, 43 S. E. 786; *Fitch v. Miller*, 200 Ill. 170, 65 N. E. 650. See also *Cassem v. Henstis*, 201 Ill. 208, 94 Am. St. Rep. 160, 66 N. E. 283; *Gunter v. Smith*, 113 Ga. 18, 38 S. E. 374.

³³ See *post*, § 1252.

the mortgagee may bring his action to foreclose after the expiration of ten years.³⁴

§ 1141. **Same—Computation of time.**—In redemption of mortgages time is computed by excluding the first day upon which the mortgage falls due and including the last day of the time of redemption.³⁵ So where mortgaged premises have been sold at foreclosure sale on a certain day, the redemptioner has until the last moment of the same day of the succeeding year (or other limited time) in which to redeem.³⁶ In those

³⁴ *Parsons v. Naggle*, 23 Minn. 328.

³⁵ *Owen v. Slatter*, 26 Ala. 547, 62 Am. Dec. 745; *Blackman v. Nearing*, 43 Conn. 53; *Weeks v. Hull*, 19 Conn. 376, 50 Am. Dec. 249; *Avery v. Stewart*, 2 Conn. 69, 7 Am. Dec. 240; *Teucher v. Hiatt*, 23 Iowa, 527, 92 Am. Dec. 440; *Smith v. Cassity*, 9 B. Mon. (Ky.) 192, 48 Am. Dec. 420; *Beamis v. Leonard*, 118 Mass. 508, 19 Am. Rep. 470; *Warren v. Slade*, 23 Mich. 6, 9 Am. Rep. 70; *Ex parte Dean*, 2 Cow. (N. Y.) 605, 14 Am. Dec. 521; *Cromlin v. Brink*, 29 Pa. St. 525; *Barber v. Chandler*, 17 Pa. St. 48, 55 Am. Dec. 533; *Jones v. Planters Bank*, 5 Humph. (Tenn.) 619, 42 Am. Dec. 471.

In the case of *Teucher v. Britt*, *supra*, the court say that at common law, the rule as to computation of time was not uniform. In certain cases the day of the act done, or happening of the event, was included; as, where a sheriff was not to be called upon to return process after six months from the expiration of his office. *King v. Adderly*, Doug. (2d ed.) 463. In computing time from an act of bankruptcy; in the limitation of actions against

the hundred upon the statute of hue and cry; to prevent a descent from barring an entry (Co. Lit. 255a), etc. But the more general rule was to exclude the day, although, each case was made to depend upon the reason of the thing, according to its circumstances. *Teucher v. Hiatt*, 23 Iowa, 527, 92 Am. Dec. 440. See *Pease v. Norton*, 6 Me. (6 Greenl.) 233; *Windsor v. China*, 4 Me. (4 Greenl.) 304; *Wheeler v. Bcnt*, 21 Mass. (4 Pick.) 167; *Bigelow v. Wilson*, 18 Mass. (1 Pick.) 485; *Portland Bank v. Maine Bank*, 11 Mass. 205; *Henry v. Jones*, 8 Mass. 453; *Rand v. Rand*, 4 N. H. 267; *Priest v. Tarlton*, 3 N. H. 93; *Ex parte Dean*, 2 Cow. (N. Y.) 605, 14 Am. Dec. 521; *Snyder v. Warren*, 2 Cow. (N. Y.) 514, 14 Am. Dec. 519; *Gillispie v. White*, 16 John. (N. Y.) 117; *Hoffman v. Deul*, 5 John. (N. Y.) 232; *Simms v. Hampton*, 1 Surg. & R. (Pa.) 411.

In *South Dakota* under the Comp. Laws, property sold at foreclosure sale may be redeemed within one year from the date of sale. *Trencriy v. American Mortgage Co.* 11 S. D. 506, 78 N. W. 991.

³⁶ *Teucher v. Hiatt*, 23 Iowa, 527, 92 Am. Dec. 440.

cases where the last day falls on Sunday, it is thought that a redemption on the following Monday will be in time.³⁷ The reason is founded in public policy, and the maxim *dies non juridicus* is given a liberal construction and effect, so as to embrace in it that which may be deemed within its purpose and meaning.³⁸ It is now well established that the observance of the Sabbath day is such a right which may be enjoined without molestation by transactions of a secular character. Hence Sunday cannot, for the purpose of performing a contract, be regarded as a day in law, and, when the performance of a contract is due on Sunday, performance on the Monday following is in time.³⁹ Thus it has been held that Sunday is to be deemed a *dies non* in determining a creditor's right to redeem the premises sold on execution from a prior redeeming creditor under a statute requiring him to redeem within twenty-four hours after the former redeems, where his redemption must be made at the sheriff's office, which the law does not re-

³⁷ *Styles v. Dickey*, 134 N. W. 702 (N. D.) See *Stibbins v. Anthony*, 5 Cal. 348; *Avery v. Stewart*, 2 Conn. 69, 7 Am. Dec. 240; *Baxley v. Bennett*, 33 Ga. 146; *Shaw v. Williams*, 87 Ind. 158, 44 Am. Rep. 756, 28 Alb. L. J. 68; *Ormsby v. Louisville*, 79 Ky. 197, 20 Am. L. Reg. 269; *Cressey v. Parks*, 75 Me. 387, 46 Am. Rep. 406; *Hammond v. American Mut. L. Ins. Co.* 76 Mass. (10 Gray) 306; *Thayer v. Felt*, 21 Mass. (4 Pick.) 354; *Kuntz v. Temple*, 48 Mo. 71; *Ansonio Brass & Copper Co. v. Connor*, 103 N. Y. 509, 9 N. E. 238; *Campbell v. International L. Assur. Soc. Co.* 4 Bosw. (N. Y.) 299; *Anonymus*, 2 Hill (N. Y.) 375; *Howard v. Ives*, 1 Hill (N. Y.) 263; *Whipple v. Williams*, 4 How. (N. Y.) Pr. 28; *Van*

Vechten v. Paddock, 12 John. (N. Y.) 178, 7 Am. Dec. 303; *Salter v. Burt*, 20 Wend. (N. Y.) 205, 32 *rett v. Allen*, 10 Ohio, 426; *Edmundson v. Wragg*, 104 Pa. St. 500, 49 Am. Rep. 590; *Barnes v. Eddy*, 12 R. I. 25.

³⁸ *Porter v. Pierce*, 120 N. Y. 217, 24 N. E. 281, 7 L.R.A. 847; *Fiend v. Park*, 20 John. (N. Y.) 140; *Van Vechten v. Paddock*, 12 John. (N. Y.) 178, 7 Am. Dec. 303.

³⁹ *Porter v. Pierce*, 120 N. Y. 217, 24 N. E. 281, 7 L.R.A. 847; *Avery v. Stewart*, 2 Conn. 69, 7 Am. Dec. 240; *Campbell v. International L. Assur. Soc.* 4 Bosw. (N. Y.) 299; *Howard v. Ives*, 1 Hill (N. Y.) 263; *Salter v. Burt*, 20 Wend. (N. Y.) 205, 32 Am. Dec. 530.

quire to be kept open on Sunday; and that in such a case a redemption made on the following Monday will be sufficient.⁴⁰

§ 1142. **Same—By junior lienholder.**—Junior lienholders will not, in the absence of any circumstance calling upon a court of equity to exercise its discretion, have any right to redeem after the lapse of the period fixed by statute.⁴¹ The time allowed for redemption, where not fixed by statute, is in the sound discretion of the court.⁴² In Iowa, a junior judgment lienholder, made a defendant to a mortgage foreclosure, has no right to redeem after nine months from the date of the sale; but if he does redeem after that time, and obtains an assignment of the certificate, and offers, of record, to take the land for the full amount due, such transaction entitles him to the rights and title of the holder of the certificate.⁴³ It has been said that the holder of a junior judgment has no right to redeem from a sale under the foreclosure of a senior mortgage, after the statutory time for redemption has expired, even though he is not made a party to the foreclosure, if his judgment is not indexed at the time of the foreclosure, unless the plaintiff in foreclosure has actual notice of the judgment at the time of foreclosure; the reason for this is the fact that third persons cannot be charged with constructive notice of a judgment unless it is correctly indexed.⁴⁴

In those cases where a subsequent incumbrancer, having knowledge of all the facts in connection with the foreclosure of a prior mortgage, declined to redeem on the ground that the property was not of sufficient value, he will not, six years

⁴⁰ *Porter v. Pierce*, 120 N. Y. 217, 24 N. E. 281, 7 L.R.A. 847.

⁴¹ See *Lindsey v. Delano*, 78 Iowa, 350, 43 N. W. 218; *Hurn v. Hill*, 70 Iowa, 38, 29 N. W. 796; *Sterling Mfg. Co. v. Early*, 69 Iowa, 94, 28 N. W. 458.

⁴² *Bremer v. Calumet & C. Canal & D. Co.* 127 Ill. 464, 18 N. E. 321.

⁴³ *Lindsey v. Delano*, 78 Iowa, 350, 43 N. W. 218; *Hurn v. Hill*, 70 Iowa, 38, 29 N. W. 796.

⁴⁴ *Sterling Mfg. Co. v. Early*, 69 Iowa, 94, 28 N. W. 458.

thereafter, be allowed to redeem from a *bona fide* purchaser who has made improvements.⁴⁵

§ 1143. Same—Receipt of rents and profits by mortgagee—Effect on right.—The English chancery court, in the case of the National Permanent Mutual Benefit Building Society v. Raper,⁴⁶ say that an order for final foreclosure of a mortgage will be made without further account and fresh period of redemption, notwithstanding the receipt by the mortgagee of rents after default has been made in payment of the principal and interest of the mortgage on the day fixed for redemption, but before the affidavit of such default is sworn.

§ 1144. Same—Fraud—Effect on redemption.—It is a well established principle of law, which we have heretofore discussed,⁴⁷ that fraud vitiates everything into which it enters. The right of redemption of mortgaged premises restricted, by statute, to a particular time from the date of default, or of a sale under mortgage foreclosure proceedings, determines the right, for the law in force at the rendition of the judgment governs,⁴⁸ except in those cases where fraud has intervened, rendering the decree and sale thereunder voidable.⁴⁹

§ 1145. Extension of time to redeem—By agreement of parties.—The parties to a mortgage may, by special agreement, fix the time within which redemption may be made, and this agreement will be enforced by the court,⁵⁰ within the

⁴⁵ *Lindsey v. Delano*, 78 Iowa, 350, 43 N. W. 218.

⁴⁶ 1 Ch. 54. (1892.)

⁴⁷ See Index tit. "Fraud."

⁴⁸ *Collins v. Scott*, 100 Cal. 446, 34 Pac. 1082; *Sheldon v. Pruessner*, 52 Kan. 593, 35 Pac. 204. See *ante*, § 1139.

⁴⁹ *Collins v. Scott*, 100 Cal. 446, 34 Pac. 1082.

⁵⁰ *Nichols v. Otto*, 132 Ill. 91, 23 N. E. 411; *Davis v. Dresback*, 81 Ill. 393; *Cox v. Ratcliff*, 105 Ind. 374, 5 N. E. 5; *Henkel v. Mix*, 38 La. An. 271; *Clark v. Crosby*, 101 Mass. 184; *Allison v. Looms*, 29

time designated in the contract,⁵¹ even though the time of redemption be extended beyond the time limited by statute,⁵² in those cases where the agreement for extension is made while

N. Y. S. R. 617, 9 N. Y. Supp. 33; *Turpie v. Lowe*, 158 Ind. 314, 92 Am. St. Rep. 310, 62 N. E. 484; *Taggart v. Blair*, 215 Ill. 339, 74 N. E. 372.

In *Louisiana* it is held that where an act of sale of land concurs with a counter letter in asserting that the transaction is a sale, and the letter stipulates that the vendor may redeem within a given time, he will lose the right forever, if it be not exercised within the time agreed on. *Henkel v. Mir*, 38 La. An. 271.

What amounts to an extension of time in which to redeem is sometimes a matter of construction of the terms of the agreement. See *woods v. McGraw*, 127 Fed. 914, 63 C. C. A. 556; *Sharpe v. Lees*, 123 Pac. 1071; *Potter v. Ft. Madison Loan & Trust Building Ass'c.* 133 Iowa, 367, 110 N. W. 616; *Ogden v. Stevens*, 241 Ill. 556, 132 Am. St. Rep. 237, 89 N. E. 741. See also *Kenmare Hard Coal, Brick & Tile Co. v. Riley*, 20 N. D. 182, 126 N. W. 241.

In the case of *Clark v. Crosby*, 101 Mass. 184, an agreement by a mortgagee, made three years after his entry to foreclose, to quit-claim the "mortgaged real estate" to a third party if he would pay before a certain day an amount which was equal to what was due on the mortgage on that day, less the amount of rents received by the mortgagee between the date of such agreement and such payment, was held not to be an extension of the right to re-

deem, though procured by the mortgagor.

In *Allison v. Loomis*, 9 N. Y. Supp. 33, 29 N. Y. S. R. 617, upon the formation of a corporation the parties agreed that one should bear half the loss which the other might sustain if in the event the enterprise proved unprofitable, and should also give a deed of lands as security for such loss and a loan; and upon the latter being called upon to make further advances a new unsigned contract was entered into, by which the former resigned as treasurer in favor of the latter, who at the end of five years was to have full possession of the real estate and the former's rights therein to cease in case of a failure to tender one-half of the loss and interest. The court held the second contract valid, and gave the former five years within which to redeem, notwithstanding an abandonment of the business before that time.

⁵¹ *Davis v. Dresback*, 81 Ill. 393. See also *Williams v. Hoffman*, 39 Ind. App. 315, 76 N. E. 440; *Mann v. Provident Life & Trust Co.* 42 Wash. 581, 85 Pac. 56.

Time is computed from the date of the instrument and not from delivery. *Johnson v. Prosperity Loan & Building Ass'c.* 94 Ill. App. 260.

⁵² *Davis v. Dresback*, 81 Ill. 393; *Oertel v. Pierce*, 116 Minn. 266, 133 N. W. 797. See *Williams v. Hoffman*, 39 Ind. App. 315, 76 N. E. 440. See *Kenmare Hard Coal, Brick & Tile Co. v. Riley*, 20 N. D. 182, 126 N. W. 241.

the right to redeem exists,⁵³ provided the mortgaged property is ultimately, and within a reasonable period, to be restored to the mortgagor.⁵⁴ Where made after default, but during the period allowed by statute for redemption, the contract will be valid, and not being within the statute of frauds, need not be in writing;⁵⁵ but where the contract is entered into after the period allowed by statute for redemption has expired, the court will not enforce it, unless the agreement is based on a new consideration.⁵⁶ In those cases where the agreement as to the time of the redemption is entered into at the time of making the loan, and inserted in the mortgage or instrument securing the same, it is not necessary that the mortgagee sign the mortgage in order to make the agreement binding upon him,⁵⁷ for the reason that both parties are not required to sign a deed of this character, in order that its stipulations shall be binding on them; being a deed pole, on acceptance by the grantee it becomes the mutual act of both parties thereto, and, for that reason, binding on them;⁵⁸ and it is not necessary to

⁵³ *Nichols v. Otto*, 132 Ill. 91, 23 N. E. 411; *Cox v. Ratcliffe*, 105 Ind. 374, 5 N. E. 5.

⁵⁴ 2 Jones on Mort. (4th ed.) § 1040.

⁵⁵ *Cox v. Ratcliffe*, 105 Ind. 374, 5 N. E. 5; *Taggart v. Blair*, 215 Ill. 339, 74 N. E. 372; *Bristol v. Hershey*, 7 Cal. App. 738, 95 Pac. 1040. See *Turpie v. Lowe*, 158 Ind. 314, 92 Am. St. Rep. 310, 62 N. E. 484; *Ogden v. Stevens*, 241 Ill. 556, 89 N. E. 741; *Williams v. Hoffman*, 39 Ind. App. 315, 76 N. E. 440.

⁵⁶ *Nicholls v. Otto*, 132 Ill. 91, 23 N. E. 411; *Chase v. McLellan*, 49 Me. 375; *McNew v. Booth*, 42 Mo. 189; *Smalley v. Hickok*, 12 Vt. 153.

⁵⁷ *Stowe v. Merrill*, 77 Me. 550. 1 Atl. 684.

⁵⁸ *Stowe v. Merrill*, 77 Me. 550, 1 Atl. 684; *Locke v. Homer*, 131 Mass.

93, 102, 41 Am. Rep. 199; *Dickason v. Williams*, 129 Mass. 182, 37 Am. Rep. 316; *Fenton v. Lord*, 128 Mass. 466; *Coolidge v. Smith*, 129 Mass. 554; *Bronson v. Coffin*, 108 Mass. 175, 186, 11 Am. Rep. 335; *Maine v. Cunston*, 98 Mass. 317, 320; *McCabe v. Swap*, 93 Mass. (14 Allen) 188, 193; *Jewet v. Draper*, 88 Mass. (6 Allen) 434; *Bramer v. Dowse*, 66 Mass. (12 Cush.) 277; *Pike v. Brown*, 61 Mass. (7 Cush.) 133; *Bowen v. Comer*, 60 Mass. (6 Cush.) 132, 136; *Newell v. Hill*, 43 Mass. (2 Met.) 181; *Nugent v. Riley*, 42 Mass. (1 Met.) 117, 35 Am. Dec. 355; *Guild v. Leonard*, 35 Mass. (18 Pick.) 511; *Minor v. Leland*, 35 Mass. (18 Pick.) 266; *Felch v. Taylor*, 30 Mass. (13 Pick.) 133; *Phelps v. Townsend*, 25 Mass. (8 Pick.) 392; *Swasey v. Little*, 24

Mass. (7 Pick.) 296; *Fletcher v. McFarlane*, 12 Mass. 43, 47; *Goodwin v. Gilbert*, 9 Mass. 510; *Rawson v. Copeland*, 2 Sandf. Ch. (N. Y.) 257; *Rogers v. Eagle Ins. Co.* 9 Wend. (N. Y.) 611, 618.

In the case of *Locke v. Homer*, 131 Mass. 93, 102, 41 Am. Rep. 199, the court say: "By the law of this commonwealth, affirmed by many decisions, the grantee, by the acceptance of the deed, becomes liable to perform, according to its terms, any promise or undertaking therein expressed to be made in his behalf, although not having himself signed the deed, he must, while the old forms of action were retained, have been sued in assumpsit and not in covenant." Citing: *Coolidge v. Smith*, 129 Mass. 554; *Dickason v. Williams*, 129 Mass. 182, 184, 37 Am. Rep. 316; *Fenton v. Lord*, 128 Mass. 466; *Maine v. Cumston*, 98 Mass. 317, 319; *McCabe v. Swap*, 96 Mass. (14 Allen) 188, 193; *Jewett v. Draper*, 88 Mass. (6 Allen) 434; *Braman v. Dowse*, 66 Mass. (12 Cush.) 227; *Pike v. Brown*, 61 Mass. (7 Cush.) 133; *Newell v. Hill*, 43 Mass. (2 Met.) 180; *Guild v. Leonard*, 35 Mass. (18 Pick.) 511; *Phelps v. Townsend*, 25 Mass. (8 Pick.) 392, 394; *Fletcher v. McFarlane*, 12 Mass. 43, 47; *Goodwin v. Gilbert*, 9 Mass. 510. See also *Rogers v. Eagle Fire Ins. Co.* 9 Wend. (N. Y.) 611; *Rawson v. Copeland*, 2 Sandf. Ch. (N. Y.) 251.

In *Tirrill v. Gage*, 86 Mass. (4 Allen) 245, 256, the supreme judicial court of Massachusetts say: "And hence it has become an established rule, applicable to all transactions, that he who accepts from another anything of value,

whether it be real or personal estate, which he knows to be subject to a duty or charge for which he is expected to pay, is presumed thereby to have impliedly contracted to take the duty or charge upon himself." Citing: *Boston & Maine Railroad Company v. Whitcher*, 83 Mass. (1 Allen) 497; *Blanchard v. Page*, 74 Mass. (8 Gray) 281; *Newell v. Hill*, 43 Mass. (2 Met.) 180; *Sheldon v. Purple*, 32 Mass. (15 Pick.) 528; *Felch v. Taylor*, 30 Mass. (13 Pick.) 133; *Swasey v. Little*, 24 Mass. (7 Pick.) 296; *Goodwin v. Gilbert*, 9 Mass. 510.

In the case of *Rogers v. Eagle Fire Ins. Co.* 9 Wend. (N. Y.) 611, 618, the court say: "Whoever takes an estate under a deed, ought, in reason and equity, be obliged to take it on the terms expressed in the deed. It is said by the court, in *Goodwin v. Gilbert* (99 Mass. 510), that it has long been settled that an action allows for deed reserved in a deed pole, meaning, no doubt, in those cases where the same was accepted by the grantee."

But in the case of *Parish v. Whitney*, 69 Mass. (3 Gray) 516, it was held that a clause in a deed pole, even if purporting to bind the grantee's heirs and assigns, was not a covenant in any sense, and did not create an incumbrance upon the land. The supreme judicial court of Massachusetts, in the case of *Bronson v. Coffin*, 108 Mass. 175, 186, 11 Am. Rep. 335, say, regarding these decisions: "If that decision can be supported, it must be as falling within the rules that no easement in or right affecting real estate can be created by contract of the party, except by deed, and that an agreement not sealed by the

insert such agreement in the notice of foreclosure of such mortgage.⁵⁹ An extension of time, however, is not binding upon an innocent purchaser.⁶⁰

§ 1146. Same—By court on statutory foreclosure.—Although the parties to a mortgage may, by proper agreement, either before or after foreclosure, arrange for the extension of the time wherein redemption may be made, yet a court of equity, on a statutory foreclosure, has no power to extend the time allowed in which to redeem, even in those cases where redemption within that time has been prevented by inevitable accident, misfortune or unforeseen calamity;⁶¹ for, although courts of equity have large powers for relief against the consequences of inevitable accident in private dealings, and may doubtless control their own process and decrees to that end, they have no such power to relieve against statutory foreclosures;⁶² and for that reason are powerless by their decrees to extend the time for a redemption on a statutory foreclosure, where redemption is not made within the time provided, no matter what the cause of such failure may be.⁶³ Thus it has

party who is to perform it cannot create a covenant to run with the land. *Dyer v. Hanford*, 50 Mass. (9 Met.) 395, 43 Am. Dec. 399; *Goddard v. Dakin*, 51 Mass. (10 Met.) 94; *Morse v. Copeland*, 68 Mass. (2 Gray) 302; *Maine v. Cumston*, 98 Mass. 317, 320; *Wright v. Wright*, 21 Conn. 329, 342; *Standen v. Christmas*, 10 Q. B. 125; *Bickford v. Parson*, 5 C. B. 920. On the other hand, it has been held in Vermont and New Hampshire that such a promise by the grantee is a deed pole, for the benefit of the adjoining land of the grantor, who retained no other interest in the land granted, was equivalent to a covenant running with the land,

and created an incumbrance thereon. *Kellogg v. Robinson*, 6 Vt. 276, 27 Am. Dec. 550; *Burbank v. Pillsbury*, 48 N. H. 475, 97 Am. Dec. 633.

⁵⁹ *Stowe v. Merrill*, 77 Me. 550, 1 Atl. 684.

⁶⁰ *Matney v. Williams*, 28 Ky. Law Rep. 494, 89 S. W. 678. See also *Swanson v. Realization & Debenture Corporation of Scotland*, 70 Minn. 380, 73 N. W. 165.

⁶¹ *Cameron v. Adams*, 31 Mich. 426; *Dodge v. Brewer*, 31 Mich. 227; *Hoover v. Johnson*, 47 Minn. 434, 50 N. W. 475.

⁶² *Cameron v. Adams*, 31 Mich. 426.

⁶³ *Cameron v. Adams*, 31 Mich. 426.

been said that the time for redemption from a valid statutory foreclosure of a mortgage cannot be extended until the determination of a suit by a second mortgagee for an accounting by the first mortgagee for rents and profits received pending the time of redemption, but the amount due must be tendered or paid within the time fixed by the statute, or stipulated by the parties.⁶⁴

§ 1147. Same.—By court of equity, when.—The general rule is that a decree of foreclosure regularly enrolled cannot be altered except by a bill of review;⁶⁵ but it is thought that a decree by default may be opened to let in a defense on the merits, of which a party has been deprived by the negligence of counsel,⁶⁶ or if there is anything inequitable in the decree or its results, when the time will be extended within which to redeem.⁶⁷ Thus it is said in the case of *Millspau v. McBride*,⁶⁸ that a decree of foreclosure by default may be opened even after enrollment to let in a defense that a prior mortgage, alleged in the bill to have been paid by the defendant, was in fact purchased by him, and is entitled to priority of payment, where such defense was prevented by

⁶⁴ *Hoover v. Johnson*, 47 Minn. 434, 50 N. W. 475.

⁶⁵ *Lillie v. Shaw*, 59 Ill. 77.

⁶⁶ *Carter v. Torrance*, 11 Ga. 655; *Herbert v. Rowles*, 38 Md. 279; *Thompson v. Golding*, 87 Mass. (5 Allen) 82; *Day v. Allaire*, 31 N. J. Eq. (4 Stew.) 215; *Embery v. Bergaminne*, 24 N. J. Eq. (9 C. E. Gr.) 229; *Brinkerhoff v. Franklin*, 21 N. J. Eq. (1 Zab.) 334; *Williams v. Sykes*, 13 N. J. Eq. (2 Beas.) 182; *Miller v. Rusforth*, 4 N. J. Eq. (3 H. W. Gr.) 174; *Nash v. Wetmore*, 33 Barb. (N. Y.) 159; *Curtis v. Ballaugh*, 4 Edw. Ch. (N. Y.) 639; *Trip v. Vincent*, 8 Paige Ch. (N. Y.) 180; *Millspau v. McBride*, 7

Paige Ch. (N. Y.) 509, 34 Am. Dec. 360; *Hazard v. Durant*, 12 R. I. 99; *Erwin v. Vint*, 6 Mumf. (Va.) 267; *Williams v. Thompson*, 2 Bro. Ch. 280.

⁶⁷ *Seymour v. Davis*, 35 Conn. 271; *Bridgeport Savings Bank v. Eldridge*, 28 Conn. 566, 73 Am. Dec. 688. See *Ogden v. Stevens*, 241 Ill. 556, 132 Am. St. Rep. 237, 89 N. E. 741; *Benson v. Bunting*, 127 Cal. 532, 78 Am. St. Rep. 81, 59 Pac. 991; *Stephenson v. Kilpatrick*, 166 Mo. 262, 65 S. W. 773. See also *Collins v. Gregg*, 109 Iowa, 506, 80 N. W. 562.

⁶⁸ 7 Paige Ch. (N. Y.) 509, 34 Am. Dec. 360.

the negligence or mistake of the defendant's solicitor; and this may be done even after the sale has been made under the decree, where the complainant is the purchaser and the property has not been resold to a *bona fide* purchaser without notice. In this case the court say that evidence is admissible, and not open to the objection that it contradicts the record, in case of a bill to obtain an extension of time in which to redeem a mortgage, but not taking notice of a previous decree of foreclosure; where defendants set up such decree and aver that it was rendered upon legal notice to plaintiffs, and with their knowledge and acquiescence, plaintiffs may offer evidence to negative these allegations, and to show that there was no legal notice, nor actual knowledge of the suit.

§ 1148. Same—Disability of infancy, imprisonment or insanity.—In case of infancy, insanity or imprisonment, the New York Code⁶⁹ provides that “the time of such a disability is not a part of the time limited” for commencing an action to redeem; “except that the time so limited cannot be extended more than five years by any such disability, except infancy; or in any case, more than one year after the disability ceases.”⁷⁰

§ 1149. Where mortgagee purchases at foreclosure sale.—The purchase by a mortgagee at his own sale, and the effect upon the rights and liabilities of the parties, has been sufficiently discussed elsewhere;⁷¹ it remains but to call attention to the effect of such purchase upon the right of redemption. It is held in some states that where the mortgagee purchases at his own sale under a power contained in the mortgage, the mortgagor or his grantee, has the optional right to affirm or disaffirm the same within a reasonable time and

⁶⁹ Code Civ. Proc. § 396.

⁷¹ See *ante*, § 610.

⁷⁰ *Messinger v. Foster*, 115 App. Div. 689, 101 N. Y. Supp. 387.

maintain a bill to redeem;⁷² and in the absence of special circumstances controlling two years is held to be a reasonable time.⁷³ The supreme court of Michigan, in the case of *Dodge v. Breme*,⁷⁴ say that where a mortgage has been foreclosed by advertisement and the premises bid in by the mortgagee, but, before the redemption ran out, an arrangement was made between the mortgagee-purchaser and the mortgagor to extend the time, and payments have been made and accepted on the strength of the agreement, the foreclosure sale and deed are thereby superseded and rendered abortive.

⁷² *Thomas v. Jones*, 84 Ala. 302, 4 So. 270; *Ezzell v. Watson*, 83 Ala. 120, 3 So. 309; *Elrod v. Smith*, 130 Ala. 212, 30 So. 420. See *Messinger v. Foster*, 115 App. Div. 689, 101 N. Y. Supp. 387.

⁷³ *Ezzell v. Watson*, 83 Ala. 120, 3 So. 309.

⁷⁴ 31 Mich. 227.

CHAPTER XLI.

REDEMPTION—WHEN MAY BE MADE.

- § 1150. In general.
- § 1151. When allowed—Omission of covenant to repay no bar to right.
- § 1152. Same—On payment of mortgage debt.
- § 1153. Same—By grantee.
- § 1154. Same—Interest, etc., received, as ground for.
- § 1155. Same—Fraud and misrepresentation as ground for.
- § 1156. Same—Unforeseen event as ground for.
- § 1157. Same—Breach of faith as ground for.
- § 1158. Same—After sale to mortgagee.
- § 1159. Same—Where interested person not party to foreclosure.
- § 1160. Same—Where mortgagee takes possession on default.
- § 1161. Same—Costs on.
- § 1162. When not allowed—Generally.
- § 1163. Same—In case of action in another court.
- § 1164. Same—In case of appeal, when.
- § 1165. Same—In case of fraud, when.
- § 1166. Same—In case of owner of part of mortgaged premises.
- § 1167. Same—In case of parol agreement.
- § 1168. Same—In case of railroads.
- § 1169. Same—In case of sale of mortgaged premises.
- § 1170. Same—In case of trust.

§ 1150. In general.—While it is true, as we have already seen, that the right of redemption is reciprocal with that of foreclosure,⁷⁵ yet where that right is lost by laches in failing to redeem within the time specified,⁷⁶ or the running of the

⁷⁵ See *ante*, § 1028.

⁷⁶ *McNees v. Swaney*, 50 Mo. 388; *Chapin v. Wright*, 41 N. J. Eq. (14 Stew.) 438, 5 Atl. 574; *Elmendorf v. Taylor*, 23 U. S. (10 Wheat.) 152, 157, 6 L. ed. 289, 291; *Cholmondeley v. Clinton*, 2 Jac. & W. 1, on appeal, *Id.* 189.

Mortgagor has a right, after condition broken, and at any time before his equity is lost by laches, to redeem the land which he has conveyed in pledge, by paying the mortgage debt. This right, however, is a pure equity, cognizable alone by courts of equity. *Chapin*

statute of limitations,⁷⁷ it cannot be revived by a tender of the amount of the mortgage⁷⁸ and interest and a demand for possession of the premises.⁷⁹ And where there is a merger of the equity of redemption in the legal estate, the right of redemption is extinguished; but whether a merger takes place where the two estates meet in one person depends upon the intention of that person, and the estates are not merged if he does not so intend.⁸⁰ Whether redemption can be made by a part owner,⁸¹ or a junior mortgagee of a part of the premises,⁸² is sufficiently discussed in a former chapter, and requires nothing further than a reference at this time.

It is said in *Debney v. Green*,⁸³ that by obtaining a judgment at law for his debt, and purchasing the mortgaged property under execution, a mortgagee does not in general deprive the mortgagor of the right of redemption. But if such judgment and execution are upon an attachment against the mortgagor, as an absconding debtor attempting to defraud the mortgagee of his security, by removing the property out of the state, he shall not be permitted to redeem, under the influence of the maxim "that he who hath done iniquity shall not have equity." And it is said that in those cases where the decree upon foreclosure of a mortgage cuts off all right of redemption, an action to reverse so much of the decree as forecloses the statutory right to redeem cannot be maintained

v. Wright, 41 N. J. Eq. (14 Stew.) 438, 5 Atl. 574.

The Missouri supreme court, in the case of *McNees v. Swaney*, 50 Mo. 388, held that the neglect of a mortgagor to redeem his property within the time specified, under the circumstances did not work a forfeiture of his rights.

⁷⁷ *McClagg v. Hancock*, 34 Ill. 476, 85 Am. Dec. 327, 42 Ill. 153; See *Ford v. Wilson*, 35 Miss. 490, 72 Am. Dec. 137; *Webber v. Chap-*

man, 42 N. H. 326, 80 Am. Dec. 111. See also *post*, chap. XLVI.

⁷⁸ See *post*, § 1177.

⁷⁹ *Miner v. Beekman*, 11 Abb. (N. Y.) Pr. N. S. 147, 42 How. (N. Y.) Pr. 33.

⁸⁰ *Knowles v. Lawton*, 13 Ga. 476, 63 Am. Dec. 290.

⁸¹ See *ante*, § 1102.

⁸² See *ante*, § 1105.

⁸³ 4 Hen. & M. (Va.) 101, 4 Am. Dec. 503.

after the time to redeem has passed, in those cases where the complainant has made no offer to redeem.⁸⁴

In the case of *Anson v. Anson*,⁸⁵ the court held that a purchaser under proceedings to foreclose a senior mortgage, to which a junior mortgagee is not made a party, cannot, by purchasing the mortgaged premises for taxes, thereby acquire rights which would bar the junior mortgagee from redeeming upon the payment of the proper amount due.⁸⁶ And in *Moore v. Andres*,⁸⁷ it is said that the equity of redemption acquired from the mortgagor by intermediate purchasers or incumbrancers is not barred by a purchase of the mortgaged premises made by the assignee of the note given for the purchase money, and who is plaintiff in execution under a judgment at law against vendee. A purchase by a stranger would have the same legal effect.

§ 1151. When allowed—Omission of covenant to repay no bar to right.—The right to redeem land sold at judicial sale on mortgage foreclosure is not impaired by the want of a covenant in the mortgage for the repayment of the money secured.⁸⁸ A sale under a power in a mortgage may cut off the right to redeem,⁸⁹ and for this reason it may become important to determine whether a given sale is a sale under a power contained in a mortgage from which there can be no redemption, or a judicial sale, from which there may be a redemption. In the case of *Chew v. Hyman*,⁹⁰ A sold his land to B, subject to a trust deed previously made containing a power of sale. B devised the land to his children upon their coming of age, and gave to his executor the power to sell it

⁸⁴ *Burley v. Flint*, 105 U. S. 247, 26 L. ed. 986.

⁸⁵ 20 Iowa, 55, 89 Am. Dec. 514.

⁸⁶ To the same effect is *Wills v. Turkey*, 22 Cal. 373, 83 Am. Dec. 74.

⁸⁷ 14 Ala. 628, 60 Am. Dec. 551.

⁸⁸ *Critchen v. Walker*, 1 Murph. (N. C.) L. 488, 4 Am. Dec. 576; *King v. King*, 3 Pr. Wm. 358, also 1 Pr. Wm. 271, 291.

⁸⁹ See *ante*, § 1052.

⁹⁰ 10 Biss. C. C. 240.

for their maintenance, in such manner and upon such terms as to him should seem best. The holder of the bond filed a bill to foreclose, making the executors and the trustee parties defendant, alleging that the latter were unwilling to execute the trust unless under an order of court. The court ordered a sale, and this sale was held to be a judicial sale, and not a sale under the power alone; that the children of B were necessary parties, and that they not having been made parties, were entitled to redeem.

§ 1152. Same—On payment of mortgage debt.—The payment of the mortgage debt extinguished the vitality of the lien and the property reverts to the mortgagor or those claiming under him. Consequently a deed of trust expressly providing that it shall be void and the property therein conveyed released upon payment by the grantor of the note secured thereby becomes void and the property reverts in the grantor upon such payment; and it cannot be made a new security for a different purpose by an assignment thereof by the grantee to a third person upon the latter's subsequently making a loan to the grantor.⁹¹ And it is said that the assignment of a lease constituting the defeasance of a deed intended as a mortgage, contrary to the terms of the lease, will not operate as a forfeiture of the right to redeem, where the lease provides for a conveyance to the lessee or his assigns upon payment of the amount of the mortgage.⁹²

All the interest of a mortgage being extinguished by payment, it follows that the grantee in a deed given him as security for the purchase money advanced by him to the purchaser cannot refuse, upon repayment of the money, to reconvey along with the land a water right which constituted the principal inducement for the purchase and was intended to be conveyed, on the ground that it was not expressly in-

⁹¹ *Bailey v. Rockafellow*, 57 Ark. 216, 21 S. W. 227.

⁹² *Shields v. Russell*, 66 Hun (N. Y.) 226, 20 N. Y. Supp. 909.

cluded in the original contract of purchase and was put into the deed at his suggestion.⁹³

§ 1153. Same—By grantee.—The right of redemption attaches to the mortgagor and those claiming under him; ⁹⁴ hence it is said that a certificate of redemption issued in the name of the grantor to a grantee of lands subject to a mortgage under which they were sold, enures to the grantee's use and benefit in those cases where his offer to redeem in his own name, as he had a legal right to do, was refused by the sheriff under the direction of the mortgagees, who became the purchasers at the foreclosure sale.⁹⁵

§ 1154. Same, interest, etc., received, as ground for.—As long as the relation of mortgagor and mortgagee remain, and is recognized, the right to redeem attaches.⁹⁶ Anything that goes to establish that this relation is recognized may be shown in support of the claim to the right to redeem. Thus it has been said that continuing to receive interest on a mortgage after foreclosure, and to treat the mortgage as still outstanding, keeps the mortgagor's right of redemption alive.⁹⁷

In the case of *Horton v. Moffit*,⁹⁸ A and B were tenants in common of the same premises, A owning two twenty-fifths and B twenty-three twenty-fifths, which had been sold under foreclosure. Afterwards, and before the expiration of the time for redemption, the certificate of sale of the premises was assigned to C, who also became by purchase the owner of the interest of A. B, who continued in possession of the premises paid to C the back tax and the interest on the price, and the year after paid another year's interest on that sum.

⁹³ *Davis v. Hopkins*, 18 Colo. 153, 32 Pac. 70.

⁹⁴ See *ante*, §§ 1025, 1107.

⁹⁵ *Willis v. Miller*, 23 Oreg. 352, 31 Pac. 827.

⁹⁶ See *Lounsbury v. Norton*, 59 Conn. 170, 22 Atl. 153; *Horton v.*

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Moffit, 14 Minn. 289, 100 Am. Dec. 222; *Hyndman v. Hyndman*, 19 Vt. 10, 46 Am. Dec. 171.

⁹⁷ *Lounsbury v. Norton*, 59 Conn. 170, 22 Atl. 153.

⁹⁸ 14 Minn. 289, 100 Am. Dec. 222.

The year following this second payment, B paid to the sheriff of the county for the purpose of redeeming the premises from sale, the amount for which they had been sold and one year's interest thereon, of which the sheriff paid, and C received twenty-three twenty-fifths, leaving a balance of two twenty-fifths in the sheriff's hands. The court held that before the time to redeem expired, the estate of the purchaser was that of a mortgage before foreclosure, an equitable estate or interest; that either of the cotenants might redeem the whole estate from the sale; that C having acquired the purchaser's interest when the relation to co-tenant did not exist, his right was fixed to hold and enforce it for his own benefit; and that there was no merger of the estate of C by his acquiring the title to the two twenty-fifths of A.

In the case of *Hyndman v. Hyndman*,⁹⁹ A being indebted to B executed to him an absolute deed to his farm, taking back a written defeasance. A received further advances from B until the sum amounted to \$600. Then they agreed that B should have the farm for \$800. B gave his note to A for the difference, and A surrendered up his writing of defeasance; but it was agreed verbally between them that B should sell the farm and A to have what he received over \$800 after paying B for his time and trouble. The court held that contract must, in equity, be still considered as a mortgage with a power of sale, and that A should be allowed to redeem the premises upon a bill brought for that purpose.

§ 1155. Same—Fraud and misrepresentation as ground for.—It is a well settled rule of law that fraud vitiates everything into which it enters. Applying this doctrine that it has been said that the relation of mortgagor and mortgagee, created by a vendee's taking possession and paying a part of the price under a contract for the purchase of land entitling him to a deed upon full payment therefor, is not changed and

⁹⁹ 19 Vt. 10, 46 Am. Dec. 171.

his right to redeem lost or defeated by an attornment or execution of a lease by him to the vendor or the latter's grantee subject to the vendee's rights, especially if the lease is obtained by fraud or misapprehension of the facts as to the state of his title.¹ And the supreme court of Illinois, in the case of *Dawson v. Vickory*,² say that in an action to foreclose a mortgage, in which a defendant sets up a subsequent conveyance of the premises to him, and that he is entitled to redeem thereunder, such conveyance will be set aside and the mortgagor permitted to redeem, upon alleging by way of crossbill and proving that the conveyance was obtained by false representations.

§ 1156. Same—Unforeseen event as ground for.—In some of the cases the establishing of an unforeseen event preventing payment has been held to raise an equity that justifies letting a party in to redeem.³ Thus, in *Kopper v. Dyer*,⁴ it is said that when a mortgagor is prevented by accident from paying an installment on the day named in a decree of foreclosure, equity will grant relief; but on terms that he satisfy the equitable rights of the other party. And in the case of *Bostwick v. Stiles*,⁵ where an uncle of the mortgagor, a man of ample means, had promised the mortgagor that he would provide him with the money necessary to pay the mortgage, which was about to be foreclosed, and the mortgagor relied upon such promise, but the uncle failed to furnish the money, the court held that the mortgagor was prevented from paying the mortgage by an unforeseen event, and that

¹ *Tant v. Guess*, 37 S. C. 489, 16 S. E. 472. See *Holridge v. Gillespie*, 2 John. Ch. (N. Y.) 30; *Villa v. Rodriguez*, 79 U. S. (12 Wall.) 323; sub nom *Alexander v. Rodriguez*, 20 L. ed. 406; *Russell v. Southard*, 53 U. S. (17 How.) 139, 13 L. ed. 927; *Webb v. Rorke*, 2 Sch. & L. 661, 9 Rev. 122.

² 150 Ill. 398, 37 N. E. 910.

³ See *Bartwick v. Stiles*, 35 Conn. 195; *Seymour v. Davis*, 35 Conn. 264; *Kopper v. Dyer*, 59 Vt. 477, 59 Am. Rep. 742.

⁴ 59 Vt. 477, 59 Am. Rep. 742.

⁵ 35 Conn. 195. See *Seymour v. Davis*, 35 Conn. 264.

he was entitled to relief in a court of equity; to have the foreclosure opened and be allowed to redeem.

§ 1157. **Same—Breach of faith as ground for.**—It is thought that a breach of faith on the part of the mortgagee or purchaser of the mortgaged property, by which the mortgagor, or those claiming under him, are injured, will furnish ground for letting the injured party in to redeem.⁶ Thus, the supreme court of Illinois, in *Union Mutual Life Insurance Company v. White*,⁷ say that an oral promise by the president of a corporation holding a trust deed that the debtor shall have time, after foreclosure, to pay the debt thereby secured, if acted on by the debtor, render the corporation, on thus acquiring the legal title for much less than its value, a trustee holding the title as a mortgage for payment of the debt; and the debtor may yet redeem by paying the sum due, with expenses.⁸ The supreme court of the United States, in the case of *Villa v. Rodriguez*,⁹ say that where the mortgagee assured the mortgagor, before and after the conveyance, that if he could sell so as to repay him the money secured by the mortgage, he would return the surplus money, or if he could sell a portion sufficient to reimburse him, he would return the unsold portion, he cannot repudiate such assurances upon which his grantors were drawn in to convey.

§ 1158. **Same—After sale to mortgagee.**—The right of a mortgagor, and those claiming under him, to redeem from

⁶ See *Union Mutual Life Ins. Co. v. White*, 106 Ill. 67; *Eckerson v. McCulloh*, 39 N. J. Eq. (12 Stew.) 115; *Alexander v. Rodriguez (Villa v. Rodriguez)* 79 U. S. (12 Wall.) 23, 20 L. ed. 406.

⁷ 106 Ill. 67.

⁸ Court of Chancery of New Jersey, in case of *Eckerson v. McCulloh*, 39 N. J. Eq. (12 Stew.)

115, to the same effect. In this case, A's property was to be sold at foreclosure sale. B agreed to bid it in for A's benefit. The court held that A could redeem from B, who, after bidding it in, repudiated the agreement.

⁹ 79 U. S. (12 Wall.) 323; sub nom. *Alexander v. Rodriguez*, 20 L. ed. 406.

a mortgage after conveyance of the equity of redemption to the mortgagee, has already been discussed.¹⁰ The right to redeem after such a conveyance, where made without a sufficient consideration, is well established.¹¹ Thus, it is said, in *Burton v. Perry*,¹² that the conveyance of mortgaged property worth much more than the amount of the mortgage, to the mortgagee, without any consideration, and without the return of the mortgage notes and securities, upon the request of the mortgagee, on the ground that such conveyance was needed by him in a pending suit, in subsequent pleadings in which he sets up his claim as mortgagee, does not extinguish the mortgagor's equity of redemption.

§ 1159. Same—Where interested person not party to foreclosure.—We have already seen that all persons who have an interest in the mortgaged property subsequent to the mortgage being foreclosed, must be made parties defendant, or their rights will not be affected by the decree of foreclosure and sale thereunder.¹³ On this ground it has been said that where lands have been sold under a decree of foreclosure on a senior mortgage, the junior mortgagee, not being a party to the suit, may redeem¹⁴ from the purchaser

¹⁰ See *ante*, § 1047.

¹¹ *Burton v. Perry*, 146 Ill. 71, 34 N. E. 60. See *Thompson v. Lee*, 31 Ala. 292; *Ennor v. Thompson*, 46 Ill. 214; *Brown v. Gaffney*, 28 Ill. 149; *Russell v. Southard*, 53 U. S. (12 How.) 139, 13 L. ed. 927.

¹² 146 Ill. 71, 34 N. E. 60.

¹³ See *ante*, § 1111.

The supreme court of Connecticut, in the case of *Pritchard v. Elton*, 38 Conn. 434, say that a petition by heirs of a mortgagor, to redeem dismissed, although they were not parties to the foreclosure, on the ground that the mortgagor had released the right of redemp-

tion under peculiar circumstances warranting a court of equity in sustaining the release.

¹⁴ As to junior's mortgagee's right to redeem. See *ante*, § 1105. The right to redeem in such case, is not governed by the limitation of two years, which in Alabama, is the prescribed bar to proceedings under the statute; but may be asserted at any time while the mortgage is operative. *Wiley v. Ewing*, 47 Ala. 418.

Under the Iowa law, making the interest of the mortgagee not an estate in land but simply a specific lien thereon to secure the debt,

at the sale, on paying the amount of his bid, with interest and costs, and the value of all permanent improvements erected by him up to the time of the tender, or offer to redeem; and if the tender is refused, the purchaser is chargeable with the value of the rent from the time of the tender and refusal.¹⁵

But it is said by the supreme court of Nebraska, in the case of *Miller v. Finn*,¹⁶ that where a foreclosure of a mortgage is had, and the decree completely executed, and the purchase-money paid, and then an incumbrancer who was not made a party to the bill to foreclose brings his action, the right of such incumbrancer to a decree to redeem his premises and receive a conveyance of the land mortgaged is not absolute. In the absence of fraud, the owner of the land under the foreclosure and sale should be protected in his title, subject only to the payment of the creditor's just claim.

§ 1160. **Same—Where mortgagee takes possession on default.**—The right of a mortgagee to take possession of the mortgaged property on default is well established, in the absence of prohibitory statutes. The supreme judicial court of Massachusetts, in the case of *Lamson v. Drake*,¹⁷ say that a tenant for life of land, on which there is a mortgage overdue, cannot hold possession of the land against the mortgagee, by paying interest as it accrues, nor can he, by paying the amount of the mortgage, compel the mortgagee to assign it to him; but a bill brought for these purposes may be maintained as a bill to redeem, if the plaintiff alleges his willingness to pay the amount due on the mortgage "in such way or upon such other terms as the court may direct," and the answer alleges that defendant's readiness to account as ordered

which is the principal thing,—the *chester*, 33 Iowa, 303. See *Hodgen* right of a junior mortgagee, who v. *Guttery*, 58 Ill. 431.

was not made a party to a fore-¹⁵ *Wiley v. Ewing*, 47 Ala. 418. closure of a prior mortgage, to re-See *post*, § 1183.

deem therefrom, is absolutely¹⁶ 1 Neb. 254.

barred in ten years. *Gower v. Win-*¹⁷ 105 Mass. 564.

by the court. The same court, in the case of *Haskins v. Hawkes*,¹⁸ say that the heirs at law of a mortgagee, by entering to foreclose, become executors in their own wrong, and the mortgagor to be entitled to a decree against them for redemption, and for the rents and profits to be accounted for by them to an administrator appointed upon the mortgagor's petition, and applied on the mortgage debt.

§ 1161. **Same—Costs on.**—It has been said that a junior mortgagee may redeem from the foreclosure of a senior mortgage, to which action he was not a party, without paying the costs of such suit.¹⁹ But it is thought that a mortgagor who waits until after the advertisement of the property for sale before filing his bill to redeem, although notified several months before that it was advertised for sale under a power in the mortgage, will be required to pay the costs of advertising.²⁰

It is said by the supreme judicial court of Massachusetts, in the case of *Hart v. Goldsmith*,²¹ that in a suit in equity to redeem a mortgage, if the defendant, by his answer, claims the performance of an usurious contract, the mortgagor is entitled to the benefit, under the statute, of a forfeiture for usury in reduction of the sum payable upon the mortgage; and if the sum tendered added to the forfeiture equals the amount due on the mortgage, the redemptioner will be entitled to a decree for redemption, without further payment, and for his costs. In the case of *Shield's v. Lozeau*,²² where a tender of the amount due on the mortgage was made after its maturity, and acceptance was refused by the mortgagee in possession, on a bill in equity to redeem,

¹⁸ 108 Mass. 379.

¹⁹ *Gaskell v. Viquesney*, 127 Ind. 244, 17 Am. St. Rep. 364, 23 N. E. 791; *Gage v. Brewster*, 31 N. Y. 218. See *post*, § 1184.

²⁰ *Means v. Anderson*, 19 R. I. 118, 32 Atl. 82.

²¹ 83 Mass. (1 Allen) 145. See *Smith v. Robinson*, 92 Mass. 130, 132.

²² 22 N. J. Eq. (7 C. E. Gr.) 447.

the court held that, under the circumstances, the complainant was entitled to a decree with costs.

§ 1162. **When not allowed—Generally.**—There are many cases in which redemption is not allowed; among these is case of appeal, where the statute prohibits redemption;²³ or the time allowed for redemption has expired;²⁴ where the mortgage is fraudulent;²⁵ where a judgment for deficiency is entered although no indebtedness actually exists, and such judgment is made the basis for proceedings to redeem;²⁶ where the applicant is the owner, or has an interest in only part of the mortgaged premises;²⁷ where the right is based on a parol agreement respecting the mortgaged property;²⁸ in case of the sale of a railroad;²⁹ in case of sale of the mortgaged property on execution or debt other than the mortgage debt;³⁰ in cases of trust in which the trustee has acted,³¹ and the like.

The supreme court of New York, in the case of *Lewis v. Duane*,³² say that under a collateral agreement between a mortgagor and mortgagee that the mortgagee is to be secured only against liabilities of an unascertained amount, and that the mortgage is to be indorsed or reduced down to the amount when ascertained, the mortgagee is not a trustee for the mortgagor; nor can the latter redeem from a foreclosure had without such ascertainment. And the supreme court of Iowa, in the case of *Lysinger v. Hayer*,³³ say that a senior mortgagor cannot redeem from a junior lien under the Iowa Code,³⁴ providing that the terms of redemption shall be the reimbursement of the amount paid by the then lienholder, added to the

²³ As Iowa Code, § 3102. See *Lombard v. Gregory*, 90 Iowa, 682, 57 N. W. 621.

²⁴ See *Seymour v. Bailey*, 66 Ill. 288.

²⁵ See *ante*, § 1144, *post*, § 1165.

²⁶ *Wetherbee v. Fitch*, 117 Ill. 67, 7 N. E. 513.

²⁷ See *ante*, § 1102.

²⁸ See *post*, § 1203.

²⁹ See *post*, § 1168.

³⁰ See *post*, § 1169.

³¹ See *post*, § 1170.

³² 69 Hun (N. Y.) 28, 23 N. Y. Supp. 433, 52 N. Y. S. R. 818.

³³ 87 Iowa, 335, 54 N. W. 145.

³⁴ Ia. Code, §§ 3166, 3107.

amount of his own lien, with interest and costs, and that when the senior creditor thus redeems from his junior he is required to pay off only the amount of those liens paramount to his own.

§ 1163. **Same—In case of action in another court.**—It is thought that where land has been mortgaged to secure the deferred payments, the fact that the title of the vendor is attacked in the federal courts will not deprive the state courts in which the land lies of jurisdiction in the matter of the mortgage, and, for that reason, will not stay foreclosure thereof, or extend the time for redemption thereof. Thus, in *Seymour v. Bailey*,³⁵ the complainant purchased land of A, giving a mortgage to secure the deferred payments, and, after his purchase, without notice of any equitable claim to the land, the administrator of B filed his bill in equity, in the United States circuit court, alleging that this and other lands had been purchased by A with funds furnished by B, on a speculation, to be afterwards sold, and after repayment of the outlay, with interest and taxes, one-half of the profit to be paid to B, praying for an account and that the unsold lands be sold, and for an injunction against A making further sales. No further injunction was in fact ever issued, or a receiver appointed. The complainant was not a party to the suit, and, during its pendency and during the late war, A foreclosed the mortgage, and the premises were sold and purchased by him. After the time of redemption had expired, the complainant filed his bill in chancery to open and set aside the decree of foreclosure and sale, and for redemption of the land. The court held that the pendency of the suit in the United States circuit court afforded no excuse to the complainant in not making his payments, and did not have the effect to deprive the courts of Illinois of jurisdiction to decree a foreclosure of the mortgage,

³⁵ 66 Ill. 288.

and consequently was no ground for equitable relief against the proceeding to foreclose.

§ 1164. Same—In case of appeal, when.—Under the statutes in some of the states the right to redeem is lost by an appeal from a judgment of foreclosure and decree of sale of the mortgaged premises. Thus, it is said, in *Lombard v. Gregory*,³⁶ that one who appeals from a judgment of foreclosure and sale of land loses the right of redemption although the judgment is reversed under Iowa Code,³⁷ providing for redemption of land within one year from the day of sale, but that in no action where defendant has taken an appeal from the district court shall he be entitled to redeem.

§ 1165. Same—In case of fraud, when.—We have already seen³⁸ a judgment for deficiency entered where no indebtedness actually exists cannot be used for the purpose of redemption,³⁹ and it is thought that a fraudulent mortgage creates no equity of redemption in respect to a creditor of the mortgagor, who, by extending his execution in the usual form upon the land mortgaged, elects to treat it as a nullity; and the sale of the equity of the redemption of such mortgage does not convey anything, even to an innocent purchaser without notice of the fraud.⁴⁰

§ 1166. Same—In case of owner of part of mortgaged premises.—The general rule is that the owner of a part of the mortgaged premises can make redemption only by paying the whole of the mortgage debt.⁴¹ This rule, however,

³⁶ 90 Iowa, 682, 54 N. W. 621.

³⁷ Ia. Code, § 3102.

³⁸ See *ante*, § 1144.

³⁹ *Wetherbee v. Fitch*, 117 Ill. 67, 7 N. E. 513.

⁴⁰ *Bullard v. Hinkley*, 6 Me. (6 Greenl.) 289, 20 Am. Dec. 304.

⁴¹ *Smith v. Kelley*, 27 Me. 237, 46

Am. Dec. 595. See *ante*, § 1025, *post*, § 1171.

The rule in the supreme court of the United States, as laid down in *Villa v. Rodriguez*, 79 U. S. (12 Wall.) 323; sub nom. *Alexander v. Rodriguez*, 20 L. ed. 406, is that one who holds a portion of the title

is for the protection of the mortgagee, and will not be applied where the equities of the mortgagee in possession are such that injustice will be done to him if he is compelled to convey the whole premises upon receipt of the mortgage debt.⁴²

§ 1167. Same—In case of parol agreement.—The supreme court of Kentucky, in *Clark v. Renaker*,⁴³ say that a right of redemption from a mortgage sale, founded on a parol agreement, should never be enforced unless clearly and satisfactorily proved. The supreme court of Virginia, in the case of *Jordan v. Katz*,⁴⁴ say that one in possession of land under a parol agreement by which another who has purchased it is to convey upon repayment of the purchase money, waives all rights under such agreement by subsequently becoming the tenant of the latter and paying rent for the property.

§ 1168. Same—In case of railroads.—Under the statutes in some of the states the rules as to redemption on mortgage foreclosures do not apply to railroads sold on mortgage foreclosure. Thus it is said that a railroad, when lawfully mortgaged as an entirety, is not real estate within the Kentucky statute conferring the right to redeem real estate when sold to foreclose a mortgage—especially in view of the provision of the Kentucky constitution,⁴⁵ to the effect that the rolling stock of a railroad shall be considered personal property.⁴⁶ And it is said in the case of *Hammock v. Farmers' Loan and Trust Company*,⁴⁷ that the legislation of Illinois giving the right to redeem mortgaged lands sold under the decree does

by deed from a portion of the mortgagor's is clothed with their rights, and is entitled to redeem such portion upon paying a proper proportion of the mortgage debt and interest.

⁴² *Shearer v. Field*, 6 Misc. (N. Y.) 189, 27 N. Y. Supp. 29.

⁴³ 20 S. W. 534, 14 Ky. L. Rep. 465.

⁴⁴ 89 Va. 628, 16 S. E. 866, 17 Va. L. L. J. 160.

⁴⁵ 1 Am. Const. 714, § 212.

⁴⁶ *Columbia Finance & T. Co. v. Kentucky U. R. Co.* 60 Fed. 794.

⁴⁷ 105 U. S. 77, 26 L. ed. 111.

not embrace the real estate of a railroad corporation mortgaged in connection with its franchises and personal property. Its real estate, personalty and franchises so mortgaged should be sold as an entirety, and without the right of redemption given by statute.

§ 1169. Same—In case of sale of mortgaged premises.—

The general rule has been said to be that a mortgagor's right to redeem is not prejudiced by any conveyance of the whole or of parts of the mortgaged premises, made by the mortgagee;⁴⁸ but in those cases where the mortgagee has taken possession, not simply under his mortgage, but under a valid sheriff's deed on execution against the mortgagor for another than the mortgage debt, there can be no redemption.⁴⁹ The supreme court of Arkansas, in the case of *Martin v. Ward*,⁵⁰ say that a mortgagor of land has no right to redemption after a decree of foreclosure and sale of land, under the statute of the state,⁵¹ providing that the mortgagee or other person authorized to make a sale under the mortgage shall apply to a justice of the peace for the appointment of appraisers, that the land when first offered for sale shall not be sold for less than two-thirds of its appraised value, and that the land sold thereunder may be redeemed by the mortgagor at any time within a year from the sale, as it applies only to a sale under a power contained in the mortgage.

§ 1170. Same—In case of trust.—In the case of *Johnson v. Robertson*,⁵² the mortgaged premises were conveyed by a husband to a trustee, for the benefit of his wife. The husband and wife removed from the state, leaving the trustee in the town where the mortgaged property was situated. A bill

⁴⁸ *Wilson v. Troup*, 2 Cow. (N. Y.) 195, 14 Am. Dec. 458. See *ante*, § 1062.

⁴⁹ *Freiknecht v. Meyer*, 38 N. J. Eq. (11 Stew.) 315.

⁵⁰ 60 Ark. 510, 30 S. W. 1041.

⁵¹ Ark. Act. March 17, 1879.

⁵² 31 Md. 476.

of foreclosure being filed, the trustee appeared, and by answer "submitted to such decree in the premises as might be right." In the decree foreclosing the mortgage, no day was named on which the trustee might redeem. The court held that the trustee having submitted to such decree as might seem right, he had waived the privilege of having a day to bring in the money. Also that the *cestui que trust* was bound by the act of the trustee, and that, in the absence of any evidence of injury to her or the trust estate, she could not be allowed to impeach, or ask a reversal of the decree on that account.

CHAPTER XLII.

REDEMPTION—TERMS, CONDITIONS, MODE AND EFFECT.

- § 1171. Amount payable to effect redemption—Discretion of court.
- § 1172. Same—Before foreclosure.
- § 1173. Same—After foreclosure and sale.
- § 1174. Same—Same—Where mortgage to secure further advances.
- § 1175. Same—Same—Where part only of debt due.
- § 1176. Mode of payment and effect.
- § 1177. Tender on redemption.
- § 1178. Usurious and compound interest.
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- § 1180. Redeeming but part of mortgaged land.
- § 1181. Requiring reconveyance of other titles.
- § 1182. Repairs—Allowance for on redemption.
- § 1183. Rents and profits—Accounting for.
- § 1184. Payment of costs of suit.
- § 1185. Taxes and assessments and disbursements.
- § 1186. Surrender of premises under statute.
- § 1187. Allowance as attorney fees.
- § 1188. Notice of intention to redeem.
- § 1189. Payment for improvements.
- § 1190. Right to assignment of mortgage.

§ 1171. Amount payable to effect redemption—Discretion of court.—A court of equity has the discretion, governed by the equities of each case, to name the terms on which and the time within which it will let in a party to a mortgage foreclosure to redeem.⁵³ The fact that a party seeking to redeem from an equitable mortgage must be regarded as bringing the amount which should be found due into court and tendering the same, he cannot complain of the amount required or the shortness of time fixed by the court for its payment.⁵⁴

⁵³ *Hanna v. Davis*, 112 Mo. 599,
20 S. W. 686.

⁵⁴ *Magnusson v. Charlson*, 32 Ill.
App. 580.

§ 1172. **Same—Before foreclosure.**—One seeking to redeem must pay all sums due under a mortgage,⁵⁵ and perform all the conditions.⁵⁶ If the person seeking to redeem is interested in only a portion of the mortgaged premises, he must nevertheless pay the whole debt, because the mortgagee cannot be required to separate his claim.⁵⁷ The supreme judicial court of Massachusetts, in the case of *Stone v. Ellis*,⁵⁸ say that the grantee of an estate upon condition, who mortgages to his grantor, and, after a foreclosure by the mortgagee on breach, files a bill to redeem, he will be allowed to redeem only upon removing all incumbrances specified in the mortgage, and performing the conditions annexed to his deed.⁵⁹

Where a mortgagee has taken possession of the mortgaged premises on breach of condition, the mortgagor or those claiming under him can redeem by paying the whole mortgage debt; because the mortgagee is not compellable to accept a less amount than the whole of his claim, and may retain possession until it is paid;⁶⁰ and this is true even when the proceedings to redeem are brought by the grantee of a mortgagor who has obtained a certificate of discharge in proceedings in bankruptcy.⁶¹

⁵⁵ See *post*, § 1179.

⁵⁶ See *Gliddon v. Andrews*, 14 Ala. 733; *Andreas v. Hubbard*, 50 Conn. 351; *Seymour v. Davis*, 35 Conn. 264; *Franklin v. Gorham*, 2 Day (Conn.) 142, 2 Am. Dec. 86; *Meacham v. Steele*, 93 Ill. 135; *Spurgen v. Adamson*, 62 Iowa, 661, 18 N. W. 293; *Douglass v. Bishop*, 27 Iowa, 216; *Smith v. Kelly*, 27 Me. 237, 46 Am. Dec. 595; *Dooley v. Potter*, 146 Mass. 148; *Lamb v. Montague*, 112 Mass. 352; *Merritt v. Hosmer*, 77 Mass. (11 Gray) 276, 71 Am. Dec. 713; *McCabe v. Bellows*, 73 Mass. (7 Gray) 148, 66 Am. Dec. 467; *People v. Fralick*, 12 Mich. 235;

Johnson v. Johnson, Walk. (Mich.) 331; *Kezer v. Clifford*, 59 N. H. 208; *Fletcher v. Chase*, 16 N. H. 42.

⁵⁷ See *ante*, § 1102; *post*, § 1173.

⁵⁸ 63 Mass. (9 Cush.) 95.

⁵⁹ See *Cowles v. Marble*, 37 Mich. 158.

⁶⁰ See *Wood v. Holland*, 53 Ark. 69, 13 S. W. 739; *Fogall v. Pirro*, 17 Abb. (N. Y.) Pr. 113; *Bell v. Mayor, etc. of New York*, 10 Paige Ch. (N. Y.) 49; *Rodriguez v. Haynes*, 76 Tex. 225, 13 S. W. 296.

⁶¹ *Stewart v. Anderson*, 10 Ala. 504; *Childs v. Childs*, 10 Ohio St. 339, 75 Am. Dec. 512; *Steadman v. Gassett*, 18 Vt. 346.

§ 1173. **Same—After foreclosure and sale.**—In many of the states the right to redeem within a prescribed time after sale under a decree of foreclosure is given by statute. This right, when thus given, is a substantial one, and must be recognized and enforced by all courts, even the United States courts sitting in equity, because the statute constitutes a rule of property in the state that enacts it.⁶² The general rule⁶³ is that under such a statute any person seeking to redeem after foreclosure and sale must pay the full amount of the mortgage debt. In those cases where the mortgaged property has been sold for less than the mortgage debt, it will not be sufficient to tender⁶⁴ the amount for which the property sold, together with the interest and costs; but the whole mortgage debt must be tendered or paid into court. The reason for this is because the party offering to redeem proceeds upon the hypothesis that, as to him, the mortgage has never been foreclosed and is still in existence. Therefore he can only lift it by paying the full amount of the mortgage debt. The money will be subject to distribution between the mortgagee and the purchaser, in equitable proportions, so as to reimburse the latter his purchase money, and pay the former the balance of his debt.⁶⁵

In a suit brought to redeem, in ascertaining the amount that is to be paid on redemption, a conditional judgment on

⁶² *Parker v. Dacres*, 130 U. S. 43, 32 L. ed. 848; *Connecticut Mut. L. Ins. Co. v. Cushman*, 108 U. S. 51, 63, 27 L. ed. 648, 652, 2 Sup. Ct. Rep. 236; *Mason v. Northwestern Mut. L. Ins. Co.* 106 U. S. 164, 27 L. ed. 130, 1 Sup. Ct. 165; *Hammock v. Farmers L. & T. Co.* 105 U. S. 77, 88; 26 L. ed. 1111, 1115; *Brine v. Hartford F. Ins. Co.* 96 U. S. 627, 24 L. ed. 858.

⁶³ Exceptions to the general rule as here laid down are set out hereafter and fully discussed in § 1180.

⁶⁴ As to tender, see *post*, § 1177.

⁶⁵ *Collins v. Riggs*, 81 U. S. (14 Wall.) 941, 20 L. ed. 723. See *Wood v. Holland*, 53 Ark. 69, 13 S. W. 739; *McCabe v. Bellows*, 73 Mass. (7 Gray) 148, 66 Am. Dec. 467; *Adams v. Brown*, 61 Mass. (7 Cush.) 220; *Barker v. Pierson*, 6 Mich. 522; *Jones v. Van Doren*, 130 U. S. 684, 692, 32 L. ed. 1077, 1080, 9 Sup. Ct. Rep. 685; *Parker v. Dacres*, 130 U. S. 43, 32 L. ed. 848, 9 Sup. Ct. Rep. 433.

a writ of entry to foreclose is conclusive evidence of the amount due on the mortgage.⁶⁶ This is upon the familiar principle that a matter in controversy, which has once been inquired into and settled by a court of competent jurisdiction, cannot be drawn in question in another suit between the same parties.⁶⁷

§ 1174. Same—Same—Where mortgage to secure further advances.—It is a well settled rule of law that a mortgage to secure future advances or services is valid, even when it does not express the object;⁶⁸ yet it is thought that where advances are made and services rendered subsequent to a judgment or mortgage lien will be a second lien to such attaching lien.⁶⁹ And it is said if further advancements are made by the mortgagee to the mortgagor after the breach of the condition of the mortgage, under an oral agreement that the

⁶⁶ *Sparhawk v. Wills*, 71 Mass. (5 Gray) 423.

⁶⁷ See *Burke v. Miller*, 70 Mass. (4 Gray) 114; *Greene v. Greene*, 68 Mass. (2 Gray) 364, 61 Am. Dec. 454; *Bigelow v. Winsor*, 67 Mass. (1 Gray) 301; *Homes v. Fish*, 18 Mass. (1 Pick.) 439, 11 Am. Dec. 218.

⁶⁸ *Brinkerhoff v. Marvin*, 5 John Ch. (N. Y.) 320; *Yelverton v. Sheldon*, 2 Sandf. Ch. (N. Y.) 781. See *Summers v. Roos*, 42 Miss. 778, 2 Am. Rep. 653; *Ely v. Parkhurst*, 25 N. J. L. (1 Dutch.) 192; *Ackerman v. Hunsicker*, 85 N. Y. 49, 39 Am. Rep. 624, 21 Hun (N. Y.) 55; *Cook v. Whipple*, 55 N. Y. 167, 14 Am. Rep. 213; *Curtis v. Leavitt*, 15 N. Y. 208; *Truscott v. King*, 6 N. Y. 158; *Averill v. Loucks*, 6 Barb. (N. Y.) 22; *Bank of Utica v. Finch*, 3 Barb. (N. Y.) 297; *Hall v. Crouse*, 3 Hun (N. Y.) 563; *James v. Johnson*, 6

John. Ch. (N. Y.) 429; *Craig v. Tappin*, 2 Sandf. Ch. (N. Y.) 84; *Barry v. Merchants Exchange Co.* 1 Sandf. Ch. (N. Y.) 314; *Bank of Albion v. Burns*, 2 Lans. (N. Y.) 57; *Lansing v. Woodworth*, 2 N. Y. Leg. Obs. 251; *Turbeville v. Gibson*, 5 Heisk (Tenn.) 596; *Jones v. New York Guarantee & I. Co.* 101 U. S. 626, 25 L. ed. 1034; *United States v. Lenox*, 2 Paine C. C. 183.

⁶⁹ *Ely v. Parkhurst*, 25 N. J. L. (1 Dutch) 192; *Ackerman v. Hunsicker*, 85 N. Y. 49, 39 Am. Rep. 624, 21 Hun (N. Y.) 55; *Curtis v. Leavitt*, 15 N. Y. 208; *Monot v. Ibert*, 33 Hun (N. Y.) 27; *Hall v. Crouse*, 13 Hun (N. Y.) 563; *Yelverton v. Sheldon*, 2 Sandf. Ch. (N. Y.) 781; *Barry v. Merchants Exchange Co.* 1 Sandf. Ch. (N. Y.) 314; *Terberville v. Gibson*, 5 Heisk. (Tenn.) 597.

mortgage shall stand as security for them, a court of equity will not aid the mortgagor, or anyone who has no higher equity than the mortgagor, to redeem without allowing for such advancements according to the agreements and rules of equity between the parties.⁷⁰

§ 1175. Same—Same—Where part only of debt due.—

Where the condition of the mortgage is that the mortgagor shall pay several sums of money at several times, and upon the non-payment of one or more of the sums first falling due the mortgagee enters for conditions broken, and the mortgagor, or those claiming under him, wishes to redeem, the mortgagee in possession will not be compelled to accept the money not yet due,⁷¹ but the mortgagor has a right to regain possession and protect his estate by paying or tendering the amount which is due;⁷² or the court may make a special decree, upon payment of the sum due, declaring that the proceedings shall stand upon leaving the mortgagee in possession until the further sum or sums shall become due.⁷³ It is thought that a different rule will prevail where the party taking possession has two or more mortgages upon the same premises, one of which is due and the others not yet due. In such case

⁷⁰ *Taft v. Stoddard*, 142 Mass. 545, 550; *Stone v. Lane*, 92 Mass. (10 Allen) 74. See *Upton v. National Bank of South Reading*, 120 Mass. 153, 156; *Joslyn v. Wyman*, 87 Mass. (5 Allen) 62; *Carpenter v. Plagge*, 192 Ill. 82, 61 N. E. 530. See *Merchants' State Bank v. Tufts*, 14 N. D. 238, 116 Am. St. Rep. 682, 103 N. W. 760.

Thus it has been said by the supreme judicial court of Massachusetts, in the case of *Taft v. Stoddard*, 142 Mass. 545, 550, that the same principle is applied when a bill to redeem is brought by one

who has taken a conveyance from the mortgagor with a knowledge of the facts. *Stone v. Lane*, 92 Mass. (10 Allen) 74; *Joslyn v. Wyman*, 87 Mass. (5 Allen) 62.

⁷¹ *Saunders v. Frost*, 22 Mass. (5 Pick.) 259, 16 Am. Dec. 394.

⁷² *Saunders v. Frost*, 22 Mass. (5 Pick.) 259, 16 Am. Dec. 394.

⁷³ *Saunders v. Frost*, 22 Mass. (5 Pick.) 259, 16 Am. Dec. 394; *Mann v. Richardson*, 38 Mass. (21 Pick.) 355, 359. See also *Hawkinson v. Banaghan*, 203 Mass. 591, 89 N. E. 1054.

redemption may be had upon payment of the mortgage that is due.⁷⁴

§ 1176. Mode of payment and effect.—A redemption of a mortgage, either before or after foreclosure, can be effected only by a satisfaction of the debt secured together with interest and costs.⁷⁵ The money required to redeem from a mortgage must be paid either to the party holding the mortgage or to the officer provided by the statute. In many of the states the law officer to whom the money is to be paid is made by the statute the sheriff in whose hands the execution is placed or by whom the same was made;⁷⁶ and such sheriff, in receiving the money for redemption, acts as an officer of the law and not as agent of the party who purchased at the sale,⁷⁷ notwithstanding the general rule that a sheriff becomes the agent of the plaintiff to receive payment of judgment when an operative execution comes into his hands, and his authority in the premises continues while the writ remains in force.⁷⁸ Where an officer is provided to receive the funds on redemption, to effect that purpose payment must be made to the officer designated. Thus it has been said that under the system of the United States courts, payment of money into the hands of the sheriff is not a redemption of the premises sold under a decree of foreclosure passed by that court, when the United States court has, by its rules, provided that the redemption money shall be paid to its clerk.⁷⁹

⁷⁴ *Lamson v. Sutherland*, 13 Vt. 309.

⁷⁵ *Fogal v. Piro*, 17 Abb. (N. Y.) Pr. 113.

⁷⁶ Under the New York statute, 1837, c. 150, § 33,—requiring one who has given a mortgage to the loan commissioners of the U. S. Deposit Fund to pay the principal and interest to the first Tuesday of October—he cannot redeem without strict compliance with the terms of

the statute. He has no right to an accounting for the rents and profits. *Thompson v. Otsego County Comm'rs*, 16 Hun (N. Y.) 86. This statute (1837 Ch. 150) was repealed in 1897 by § 110, Ch. 413 (State Finance Law § 110).

⁷⁷ *Horton v. Moffitt*, 14 Minn. 289, 100 Am. Dec. 222.

⁷⁸ *Harris v. Ellis*, 30 Tex. 4, 94 Am. Dec. 296.

⁷⁹ *Connecticut Mutual Life Ins.*

§ 1177. **Tender on redemption.**—A tender of the amount due on the mortgage is generally regarded as an essential to redemption,⁸⁰ and the party seeking to redeem must offer to pay the whole mortgage debt due, and not merely the sum for which the land sold, where it brought less than the full amount of the mortgage debt, together

Co. v. Crawford, 21 Fed. 231. In this case the court say: "In July, 1878, long prior to the proceedings in question, this court adopted certain rules for regulating the redemption from sales in this court, in cases where redemption is allowed by the statute of the State of Illinois. These rules were adopted in accordance with the suggestion made by the supreme court of the United States, in *Brine v. Ins. Co.* 96 U. S. 627, and they have since been confirmed in the case of the *Connecticut Mut. Life Ins. Co. v. Cushman*, 108 U. S. 56, 2 Sup. Ct. Rep. 236; and the court there holds, in substance, that it is not only within the power, but it is the duty, of the federal court, when rights are given by a state statute, to adjust the practice of the court by its rules, so as to secure and protect the property rights given by the statute. In the same case it is also held that the rules adopted by this court were within the scope and power of the court, and such it was not only the right but the duty of the court to adopt. This court, by the rules of 1878, provided that redemption should be made by a judgment creditor from a sale under a judgment or decree of this court, by the creditor suing out his execution in the ordinary manner on his judgment, placing his execution in the hands of the proper officer to

execute, and paying the money needed to redeem into the hands of the clerk of this court, together with the commissions of the clerk for receiving and paying out the money. The redeeming creditor in this case ignored these rules, and undertook to make a redemption by paying his money to an officer not known to this court, and not within its control, and with whom the court had no relations whatever, and with whom, it seems to me, it is not in the power of the redeeming or judgment creditor to bring the complainant or this court into relations. The complainant, being a non-resident corporation, had a right to seek this forum as the one through which it would enforce its lien on these lots, and was not obliged to look to any state court or its officers for the purpose of obtaining the money, after this court had made the rules of procedure."

⁸⁰ *Horn v. Indianapolis National Bank*, 125 Ind. 381, 25 N. E. 558, 9 L.R.A. 676, 21 Am. St. Rep. 231. See *Dayton v. Dayton*, 68 Mich. 437, 36 N. W. 209; *Still v. Buzzell*, 60 Vt. 478, 12 Atl. 209, 644; *Kopper v. Dyer*, 59 Vt. 477, 59 Am. Rep. 742, 9 Atl. 4; *Lumsden v. Manson*, 96 Me. 375, 52 Atl. 783; *Hamil v. Copeland*, 26 Colo. 178, 56 Pac. 901. See *Erickson v. Thelin*, 26 S. D. 441, 128 N. W. 598; *Bean v. Pearce*, 151 Ala. 165, 44 So. 83; *Tyson v.*

with interest and costs.⁸¹ The rule that the lien of the mortgage cannot be discharged either in whole or in part by a tender of less than the whole amount due thereon, is not affected by the fact that only a portion of the amount due belongs to the holder of the mortgage, and the balance thereof to some other person, for where such holder acts as trustee,⁸² where a junior lienor or other person in interest seeks to redeem from a prior mortgagee, he must make a tender in such unmistakable terms that there can be no doubt of the intention to satisfy and discharge the senior mortgage, not to redeem for a transfer of it.⁸³ And where it is the design

Chestnut, 118 Ala. 387, 24 So. 73; Effect of tender, see *Leet v. Armbruster*, 143 Cal. 663, 77 Pac. 653.

Tender to the wrong party is insufficient. *Daggs v. Wilson*, 6 Ariz. 388, 59 Pac. 150.

As to keeping tender good see *Dickerson v. Simmons*, 141 N. C. 325, 53 S. E. 850; *Iowa Loan & Trust Co. v. Kunsch*, 135 N. W. 426 (Iowa).

In some states the money must be deposited in court. *Murphree v. Summerlin*, 114 Ala. 54, 21 So. 470; *Lewis v. McBride*, 57 So. 705; *Given v. Troxel*, 39 So. 578 (Ala.); *Long v. Slade & Farrish*, 121 Ala. 267, 26 So. 31; *Iowa Loan & Trust Co. v. Kunsch*, 135 N. W. 426. See *Brown v. Wentworth*, 181 Mass. 49, 62 N. E. 984. See also *Dunn v. Hunt*, 76 Minn. 196, 78 N. W. 1110. But see *Hammett v. White*, 128 Ala. 380, 29 So. 547. While in Texas and Missouri the money need not be deposited in court. *Burks v. Burks*, 141 S. W. 337 (Tex.); *Potter v. Schaffer*, 209 Mo. 586, 108 S. W. 60.

⁸¹ *Wood v. Holland*, 53 Ark. 69, 13 S. W. 739; *Horn v. Indianapolis National Bank*, 125 Ind. 381, 23 N.

E. 558, 9 L.R.A. 676, 21 Am. St. Rep. 231; *Shannon v. Hay*, 106 Ind. 589, 7 N. E. 376; *Rodriguez v. Hayes*, 76 Tex. 225, 13 S. W. 296. See *post*, § 1191.

In Indiana where a mortgagor seeks to have his title quieted against the purchaser at foreclosure sale, he must show that he has paid or tendered to the purchaser the amount paid by him in satisfaction of the mortgage debt, before he can avail himself of any illegality in the sale. *Shannon v. Hay*, 106 Ind. 589, 7 N. E. 376.

⁸² *Graham v. Lanham*, 50 N. Y. 547.

⁸³ *Ferguson v. Wagner*, 41 Ind. 450; *Benton v. Hatch*, 122 N. Y. 329, 25 N. E. 486; *Clark v. Mackin*, 95 N. Y. 345, 351; *Twombly v. Cassidy*, 82 N. Y. 155; *Frost v. Yonkers Sav. Bank*, 70 N. Y. 553, 26 Am. Rep. 627; *Cole v. Malcolm*, 66 N. Y. 363. See *Lumsden v. Manson*, 96 Me. 357, 52 Atl. 783; *Fields v. Danenhower*, 65 Ark. 392, 46 S. W. 938, 43 L.R.A. 519. See also *Harden v. Collins*, 138 Ala. 399, 100 Am. St. Rep. 42, 35 So. 357.

Thus in a case where a party bor-

of the parties to redeem but a portion of the property sold on the foreclosure of a senior mortgage, there must be a tender of the entire amount of the senior mortgage debt.⁸⁴

The supreme court of Texas, in the case of *Rodriguez v. Hayes*,⁸⁵ say that where a mortgagee is placed in possession under the mortgage and entitled to retain it, the mortgagor cannot recover possession after condition broken, without discharging the debt, although the latter is barred by limitation.

There are circumstances under which a tender of the amount due on a mortgage need not be made by a person seeking to redeem.⁸⁶ Thus it has been said that a tender of the amount due a senior lienholder in possession of his debtor's property under a judicial sale is excused in favor of a junior lienholder seeking to redeem the property, where the former has money in his hands exceeding the amount of his claim, which he is equitably bound to apply in discharge thereof.⁸⁷ In some of the states a tender is not necessary in redemption proceedings. Thus the supreme court of Missouri, in the case of *Kline v. Vogel*,⁸⁸ say it is unnecessary for the mortgagor to make a tender before seeking to compel redemption; all that is necessary is that he pay the sum

rowed \$1,000 upon a note, and also offered a mortgage to secure the note, and on the appointed day for redemption took the money and said in effect to the mortgagee, "I will pay you this money if you will first transfer the mortgage and the note to a third person; the court held that such an offer was not a tender, but a mere overture, a proposition which the mortgagee might accept or not, as he saw fit, and that his foreclosure was valid. *Ferguson v. Wagner*, 41 Ind. 450.

⁸⁴ See *Smith v. Shay*, 62 Iowa, 119, 17 N. W. 444; *Knowles v. Rab-*

lin, 20 Iowa, 101; *Street v. Beal*, 16 Iowa, 68, 85 Am. Dec. 504; *White v. Hampton*, 13 Iowa, 259; *Heimstreet v. Winne*, 10 Iowa, 430.

⁸⁵ 76 Tex. 225, 13 S. W. 296.

⁸⁶ See *DeLeonis v. Walsh*, as *adm'r*, etc. 140 Cal. 175, 73 Pac. 813; *Aust v. Rosenbaum*, 74 Miss. 893, 21 So. 555; *Taylor v. Dillenberg*, 168 Ill. 235, 48 N. E. 41; *Nestor v. Davis*, 100 Miss. 199, 56 So. 347.

⁸⁷ *Horn v. Indianapolis Nat. Bk.* 125 Ind. 381, 25 N. E. 558, 9 L.R.A. 676, 21 Am. St. Rep. 231.

⁸⁸ 90 Mo. 239, 2 S. W. 408.

found by the court to be due, within the time limited by the decree.⁸⁹

§ 1178. Usurious and compound interest.—The person seeking to redeem from a mortgage is not required to pay usurious or compound interest, although the note secured by the mortgage may in terms require it.⁹⁰ Thus in a case where the original mortgagor, in a mortgage given to secure a note with interest payable annually, gave a second note for the interest computed annually, the court said the mortgagor might redeem upon payment of the original note and simple interest.⁹¹ In those cases where usurious interest is reserved, the fact may be pleaded in the bill to redeem and the party will be entitled to have an allowance made him of the statutory penalty for unpaid interest, and a deduction thereof from the sum payable to mortgagee to redeem; but he will not be entitled to an allowance for usurious interest paid by a former owner of the equity.⁹²

§ 1179. Redeeming whole of mortgaged land.—We have already seen that where a person seeks to redeem from a mortgage, he must pay the full amount of the debt and comply with the covenants and conditions in the instrument.⁹³ This applies equally to persons holding the entire equity, and

⁸⁹ See *Owen v. Blake*, 44 Ill. 135; *Barnard v. Cushman*, 35 Ill. 481; *Reeves v. Cooper*, 12 N. J. Eq. (1 Beas.) 223; *Parsons v. Parsons*, 9 N. H. 336, 32 Am. Dec. 362.

⁹⁰ *Parkhurst v. Cummings*, 56 Me. 155. See *First National Bank v. Clark*, 161 Ala. 497, 49 So. 807.

⁹¹ *Parkhurst v. Cummings*, 56 Me. 155.

⁹² See *Adams v. McKenzie*, 18 Ala. 698; *Gerrish v. Black*, 104 Mass. 400; *Smith v. Robinson*, 92 Mass. (10 Allen) 130; *Minot v.*

Sawyer, 90 Mass. (8 Allen) 78; *Drury v. Morse*, 85 Mass. (3 Allen) 445; *Hart v. Goldsmith*, 83 Mass. (1 Allen) 145; *Butterfield v. Kidder*, 25 Mass. (8 Pick.) 512; *Kirkpatrick v. Smith*, 55 Mo. 389; *Perrine v. Poulson*, 53 Mo. 309; *Fanning v. Dunham*, 5 John. Ch. (N. Y.) 122, 145, 9 Am. Dec. 283; *Eagleson v. Shotwell*, 1 John. Ch. (N. Y.) 536; *Rufus v. Rathburn*, 1 John. Ch. (N. Y.) 367; *Henkle v. Royal Exch. Asso. Co.* 1 Vern. 320.

⁹³ See *ante*, § 1024 *et seq.*

to those who hold only an undivided portion of a lot or tract of land.⁹⁴ On payment of the whole debt the party redeeming is subrogated to the interest of the holder of the mortgage,⁹⁵ and cannot compel contribution from all others interested in the mortgaged land.⁹⁶

It is said that, in order to be able to redeem from a mortgage on the property of a railroad company, lying in different states, the entire mortgage must be redeemed, for the reason that the mortgagee has a lien upon every part of the railroad to secure every part of his mortgage debt.⁹⁷

§ 1180. Redeeming but part of mortgaged land.—We have already seen that the general rule is that a person seeking to redeem, either before⁹⁸ or after⁹⁹ maturity, or after foreclosure,¹ must pay the full amount of the mortgage debt,² and redeem the whole of the mortgaged land;³ but to this general rule there are certain well-defined exceptions that exist under special circumstances, which would make the enforcement of the rule inequitable. Thus, where the mortgage has been foreclosed and the land purchased by the holder of the mortgage, without making all the persons interested parties to the suit,⁴ the owner of a portion of the mortgaged premises not made a party is entitled to redeem his portion of the mortgaged premises on paying the proportionate amount of the mortgage debt his portion of the land should bear.⁵ The reason for this exception is that the holder of the

⁹⁴ *Buettel v. Harmount*, 46 Minn. 481, 49 N. W. 250. See *Calkins v. Mansel*, 2 Root (Conn.) 333; *Johnson v. Handage*, 31 Me. 28; *Merritt v. Hosmer*, 77 Mass. (11 Gray) 276, 71 Am. Dec. 713; *Gibson v. Crehore*, 22 Mass. (5 Pick.) 152; *Taylor v. Bassett*, 3 N. H. 290; *Palk v. Clinton*, 12 Ves. 59, 8 Rev. 283.

⁹⁵ See *ante*, § 1102.

⁹⁶ See *post*, § 1208 *et seq.*

⁹⁷ *Wood v. Goodwin*, 49 Me. 260, 77 Am. Dec. 259.

⁹⁸ See *ante*, § 1136.

⁹⁹ See *ante*, § 1137.

¹ See *ante*, §§ 1139, 1173.

² See *ante*, § 1171.

³ See *ante*, § 1179.

⁴ As to rights of interested persons not made parties to an action to foreclose. See *ante*, § 1056.

⁵ *Green v. Dixon*, 9 Wis. 532.

mortgage, by such a foreclosure, sale and purchase, voluntarily severs his right to receive the whole of the mortgage debt,⁶ and to have the whole of the mortgaged premises redeemed,⁷ obtaining an indefeasible title to such part of the mortgaged premises as the owners there were duly made parties to the proceedings, and a defeasible title as to that portion the owners of which were not made parties.⁸

Another exception to the general rule, is in those cases where one takes a deed of warranty to a portion of a mortgaged tract of land, and the remaining portion of the land is sufficient to satisfy the mortgage debt in full. Under these circumstances, the purchaser of such portion may maintain a bill in equity to redeem the portion purchased against a subsequent assignee of the mortgage, without contribution,⁹ although such assignee may have become the owner of the equity of redemption of the remaining portion of the land.¹⁰

Another exception to the general rule, evidently based upon grounds of public policy, is the right of a railroad company, which has taken for its uses land upon which there is a mortgage or other prior lien, to redeem from such mortgage or prior lien the lands appropriated to its use upon paying a ratable proportion of the mortgage debt,¹¹ which it must do to the full value of the property, if need be, irrespective of improvements put thereon by the railroad company.¹²

⁶ See *ante*, § 1171.

⁷ See *ante*, § 1179.

⁸ See Jones on Mortg. (4th ed.) § 1074.

⁹ See *post*, chap. XLIV.

¹⁰ *Bradley v. George*, 84 Mass. (2 Allen) 392. See *Dooley v. Potter*, 140 Mass. 49, 59; *Beard v. Fitzgerald*, 105 Mass. 134; *George v. Wood*, 93 Mass. (11 Allen) 43, 91 Mass. (9 Allen) 80, 82, 85 Am. Dec. 741; *Kilburn v. Robbins*, 90 Mass. (8 Allen) 466, 470; *Welch v. Beers*, 90 Mass. (8 Allen) 151, 152; *George v. Kent*, 89 Mass. (7 Al-

len) 16; *Chare v. Woodbury*, 60 Mass. (6 Cush.) 143; *Parkham v. Welch*, 36 Mass. (19 Pick.) 231; *Hedge v. Holmes*, 27 Mass. (10 Pick.) 380; *Amory v. Fairbanks*, 3 Mass. 562; *Newall v. Wright*, 3 Mass. 138, 150, 3 Am. Dec. 98.

¹¹ *Dows v. Congdon*, 16 How. (N. Y.) Pr. 571. See *North Hudson County R. Co. v. Booraem*, 28 N. J. Eq. (1 Stew.) 593.

¹² *Dows v. Congdon*, 16 How. (N. Y.) Pr. 571; *Aspinwall v. Chicago & N. W. R. Co.* 41 Wis. 474.

And where mortgaged property is sold in parcels the mortgagor may redeem one of the parcels at the price paid therefor at the sale, with interest, taxes and costs added, without paying the amount realized from the sale of the entire mortgaged premises.¹³

§ 1181. **Requiring reconveyance of other titles.**—On a redemption a mortgagor, or those claiming under him, cannot require the reconveyance of more than passed by the mortgage deed. Such redemptioner certainly cannot obtain or require in such a reconveyance any adverse or superior title subsequently and in good faith acquired by the mortgagee or his assignee, and the reconveyance from the mortgagee or his assignee should, therefore, be limited to the interest conveyed by the mortgage deed.¹⁴ In the case of *Roberts v. Fleming*,¹⁵ a mortgagee, under a power in the mortgage, sold the premises and improperly himself became the purchaser indirectly. Subsequently, and while in possession under his purchase, he acquired an outstanding title to a portion of the mortgaged premises, which had been sold under a prior judgment lien. On bill brought to redeem it was held that he should be allowed the amount of his mortgage debt and interest, all taxes paid upon the land, and all reasonable repairs, as well as necessary and permanent improvements, made prior to filing the bill to redeem; but that he should not be allowed the amount he paid for outstanding title, or be charged with rents and profits¹⁶ received, or which might have been received by reasonable effort and proper management of the property.¹⁷

¹³ *State ex rel. Twiss v. Carpenter, as sheriff, etc.* 19 Wash. 378, 53 Pac. 342.

¹⁴ *Hall v. Arnott*, 80 Cal. 348, 22 Pac. 200.

¹⁵ 53 Ill. 196.

¹⁶ *Roberts v. Fleming*, 53 Ill. 196. As to rents and profits, see full discussion, *post*, § 1183.

¹⁷ *Roberts v. Fleming*, 53 Ill. 196. See also *Eldriedge v. Hoefer*, 52 Or. 241, 96 Pac. 1105.

§ 1182. **Repairs—Allowance for on redemption.**—The cost of repairs necessarily made¹⁸ and improvements,¹⁹ reasonable in their character, and beneficial to the estate, made in good faith, should be allowed for on redemption.²⁰ Thus it has been said by the supreme court of Missouri, in the case of *Stevenson v. Edwards*,²¹ that persons who have a remainder under a deed which has been declared void as to creditors and purchasers, but valid as between the parties thereto, may bring suit to redeem the land from the lien of deeds of trust executed by the life tenant, though the land has been sold thereunder, but must allow the purchaser under such sale the cost of all necessary expenses and repairs.

§ 1183. **Rents and profits—Accounting for.**—A purchaser at a foreclosure sale is not usually required to account for rents and profits, especially where such purchaser is other than the mortgagee,²² except in those cases where the

¹⁸ *Whetstone v. McQueen*, 137 Ala. 301, 34 So. 229. See *American Freehold Land Mortgage Co. v. Pollard*, 132 Ala. 155, 32 So. 630.

¹⁹ See *post*, § 1189.

²⁰ *Lynch v. Ryan*, 137 Wis. 13, 129 Am. St. Rep. 1040, 118 N. W. 174.

²¹ 98 Mo. 622, 12 S. W. 255.

²² See *Roberts v. Fleming*, 53 Ill. 196; *Gaskell v. Viquesney*, 122 Ind. 244, 17 Am. St. Rep. 364, 23 N. E. 791; *Harrison v. Edwards*, 98 Mo. 622, 12 S. W. 255; *Higinbotham v. Benson*, 24 Neb. 461, 39 N. W. 418, 8 Am. St. Rep. 211; *Renard v. Brown*, 7 Neb. 449; *American Freehold Land Mortgage Co. v. Pollard*, 132 Ala. 155, 32 So. 630; *Ruprecht v. Henrici*, 127 Ill. App. 350. See also *Shelley as ex'r, etc. v. Cody*, 187 N. Y. 166, 79 N. E. 994; *Potter v. Shaffer*, 209 Mo. 586, 108 S. W. 60.

In the case of *Roberts v. Flem-*

ing, 53 Ill. 196, a mortgagee, under a power in the mortgage, sold the premises, but improperly became the purchaser himself, indirectly. Subsequently, and while in possession, he purchased in the outstanding title to a portion of the mortgaged premises, which had been sold under a prior judgment lien. The mortgage bore date of July 30, 1858, and his sale was made December, 1860. In January, 1865, a bill was filed to redeem. The court held that redemption should be allowed on these terms: The mortgagee to be allowed the amount of his mortgage debt, and interest, all taxes paid upon the lands, and all reasonable repairs, and, on account of the delay in filing the bill to redeem, for necessary and permanent improvements, made prior to the filing of the bill. He should be charged with the amount bid at the

possession was not only wrongfully taken by the mortgagee, but accompanied by force and fraud, in which case the mortgagee, on a suit to redeem, cannot be charged with less than the whole rental value during his possession;²³ and it has even been said that a mortgagee who purchases the premises on a foreclosure sale, and takes possession in the capacity of owner, is not liable to account for rents and profits on a redemption.²⁴ But it has been said that a junior incumbrancer on redemption can compel a senior mortgagee who has been in possession, to account for rents and profits, in the same manner that the mortgagor could do so.²⁵ And it is held that in a suit by a remainderman to redeem lands mortgaged by the life tenant, the mortgagee must account for all rents received by him; and it is no defense that he has paid a part of them to the life tenant.²⁶

§ 1184. **Payment of costs of suit.**—The question of costs on a bill brought to redeem has already been partially discussed,²⁷ and will hereafter²⁸ receive fuller consideration.

It is a universal rule that a mortgagor who waits until after the advertisement of the property for sale before filing his bill to redeem, although notified several months before that the property was advertised for sale under a power in the mortgage, will be required to pay the costs of advertising.²⁹

mortgage sale upon that portion of the lands to which he acquired the outstanding title, but not with the rents and profits thereof, nor should he be allowed the amount paid for the outstanding title. Upon the residue of the mortgaged premises, he should be charged with the rents and profits received, or which might have been received by reasonable effort and proper management of the property.

²³ *Meigs v. McFarlan*, 72 Mich. 194, 40 N. W. 246.

²⁴ *Gaskell v. Viquesney*, 122 Ind. 244, 17 Am. St. Rep. 364, 23 N. E. 791.

²⁵ *Gaskell v. Viquesney*, 122 Ind. 244, 17 Am. St. Rep. 364, 23 N. E. 791.

²⁶ *Stevenson v. Edwards*, 98 Mo. 622, 12 S. W. 255.

²⁷ See *ante*, § 1161.

²⁸ See *post*, § 1243.

²⁹ *Means v. Anderson*, 19 R. I. 118, 32 Atl. 82.

And a junior mortgagee redeeming from a foreclosure by a senior mortgagee, will usually be requested to pay the costs of foreclosure and sale,³⁰ except in those cases where he has not been made a party to the action to foreclose the senior mortgage.³¹

§ 1185. Taxes and assessments and disbursements.—

The universal rule is that mortgaged property, notwithstanding the mortgage, is liable for the taxes and assessments duly and regularly assessed and levied.³² Consequently where a party, by way of cross-bill or otherwise, seeks to redeem the whole or a portion of the pledged premises, he will be required to pay the whole or a proportionate amount of the valid taxes and assessments which have been paid to protect the property and the lien thereon, notwithstanding the mortgage does not especially so provide.³³ But whether the money paid

³⁰ *Stanbrough v. Daniels*, 77 Iowa, 561, 42 N. W. 443.

³¹ *Gaskell v. Viquesney*, 122 Ind. 244, 17 Am. St. Rep. 364, 23 N. E. 791; *Page v. Brewster*, 31 N. Y. 218; *Jones v. Dutch*, 3 Neb. (Unof.) 673, 92 N. W. 735. See *ante*, 755.

³² *Lynch v. Ryan*, 137 Wis. 13, 129 Am. St. Rep. 1040, 118 N. W. 174. See *Kelso v. Norton*, 74 Kan. 442, 87 Pac. 184.

³³ *Saunders v. Peck*, 131 Ill. 407, 25 N. E. 508, revers'g 30 Ill. App. 238; *Miner v. Beekman*, 50 N. Y. 337. See *Broquet v. Sterling*, 56 Iowa, 357, 9 N. W. 301; *Strong v. Burdick*, 52 Iowa, 630, 3 N. W. 707; *Williams v. Hilton*, 35 Me. 547, 58 Am. Dec. 729; *Walton v. Hollywood*, 47 Mich. 385, 11 N. W. 209; *Nopson v. Horton*, 20 Minn. 268; *Manning v. Tuthill*, 30 N. J. Eq. (5 Stew.) 29; *Sidenberg v. Ely*, 90 N. Y. 257, 43 Am. Rep. 163; *Robinson*

v. Ryan, 25 N. Y. 320, 327; *Madison Ave. Church v. Oliver St. Church*, 41 N. Y. Supr. Ct. 383; *Fleishauer v. Doellner*, 9 Abb. (N. Y.) N. C. 372; *Kortright v. Cady*, 23 Barb. (N. Y.) 490; *Dale v. McEvers*, 2 Cow. (N. Y.) 118; *Eagle F. Ins. Co. v. Pell*, 2 Edw. Ch. (N. Y.) 631; *Rapelye v. Prince*, 4 Hill (N. Y.) 119, 40 Am. Dec. 267; *Fauer v. Winans*, 1 Hopk. Ch. (N. Y.) 283, 14 Am. Dec. 545; *Brevoort v. Randolph*, 7 How. (N. Y.) Pr. 398; *Weed v. Hornby*, 35 Hun (N. Y.) 582; *Silver Lake Bank v. North*, 4 John. Ch. (N. Y.) 370; *Burr v. Veeder*, 3 Wend. (N. Y.) 412; *Goldbeck's Appeal*, 4 Sadler (Pa.) 488, 8 Atl. 29; *Stillman v. Rosenberg*, 78 N. W. 913 (Iowa); *Dubois v. Bowles*, 30 Colo. 44, 69 Pac. 1067. See *Crummett v. Littlefield*, 98 Me. 317, 56 Atl. 1053. But see *McAbee v. Harrison*, 50 S. C.

to redeem the mortgaged premises from a tax sale becomes a part of the mortgage debt and chargeable to the redemption, there is a lack of harmony in the authorities. There is a strong line of decisions holding that the money so paid by the mortgagee or purchaser at foreclosure sale, becomes a part of the mortgage debt in equity,³⁴ especially where the tax title is bought up to protect the lien before the sale under foreclosure,³⁵ on the theory that if the tax title fails the mortgagee or holder of the mortgage may enforce the tax liens by proceedings to foreclose the same.³⁶ On the other hand, Mr. Jones, in his work on mortgages,³⁷ says that a statutory provision to the effect that the amount of money paid in discharge of valid taxes and assessments on the mortgaged lands by the mortgagee shall constitute a lien and be collectible with the mortgage debt, does not entitle the mortgagee to add to the mortgage debt in this way the amount paid by him in purchasing at a tax sale, alleging that such a purchase is not a payment of taxes, but a purchase of a new lien upon the estate independent of his mortgage. The reason for such a rule is a little difficult to ferret out. The learned author cites but one case, that of *Williams v. Townsend*,³⁸ but it is thought

39, 27 S. E. 539; *Fulton v. Aldrich*, 76 Vt. 310, 57 Atl. 108.

³⁴ See *Mix v. Hotchkiss*, 14 Conn. 32; *Williams v. Hilton*, 35 Me. 457, 58 Am. Dec. 734; *Skilton v. Roberts*, 129 Mass. 306; *Davis v. Bean*, 114 Mass. 360; *Schoenheit v. Nelson*, 16 Neb. 235, 2 N. W. 205; *Brown v. Simons*, 44 N. H. 475; *Sidenberg v. Ely*, 90 N. Y. 257, 262, 43 Am. Rep. 163; *Marshall v. Davis*, 78 N. Y. 414; *Williams v. Townsend*, 31 N. Y. 414; *Robinson v. Ryan*, 25 N. Y. 320; *Eagle F. Ins. Co. v. Pell*, 2 Edw. Ch. 631; *Faucer v. Winans*, 1 Hopk. Ch. (N. Pr. 388; *Burr v. Veeder*, 3 Wend. (N. Y.) 412; *Government Build-*

ing & Loan Institution v. Richards, 32 Ind. App. 24, 68 N. E. 1039.

³⁵ *Skilton v. Roberts*, 129 Mass. 306, 309.

³⁶ *Schoenheit v. Nelson*, 16 Neb. 235, 20 N. W. 205. See *Zahradnicek v. Selby*, 15 Neb. 579, 19 N. W. 645; *Reed v. Merriam*, 15 Neb. 323, 18 N. W. 137; *Towle v. Holt*, 14 Neb. 222, 15 N. W. 203; *Miller v. Hurford*, 13 Neb. 14, 12 N. W. 832; *Wilhelm v. Russell*, 8 Neb. 120; *Pettitt v. Black*, 8 Neb. 52; *Peet v. O'Brien*, 5 Neb. 360.

³⁷ 2 Jones on Mortg. (4th ed.) § 1080.

³⁸ 31 N. Y. 411.

this case is not authority for such a rule. All that the court decide in that case is that where a mortgagee has a right, in default of the mortgagor, to pay taxes and assessments and collect them as part of the mortgage debt, he cannot, by bidding in the premises at a tax sale, and taking a certificate therefor, deprive the mortgagor of the right given by statute to redeem the sale for taxes. The application since made of that decision by the New York court of appeals shows unmistakably that they do not regard it as announcing the doctrine attributed to it.³⁹

³⁹ *Williams v. Townsend* has been referred to, cited or distinguished six times by the court of appeals of New York, four times on question of taxes and twice on questions of incumbrances.

In the case of *Oliphant v. Burns*, 146 N. Y. 218, 241, it is distinguished and declared to be inapplicable.

In the case of *People ex rel. Oakley v. Blackmann*, 126 N. Y. 310, 317, it is cited by Judge Gray in the following discussion, "This court in the case of *In re Clementi v. Jackson*, 92 N. Y. 591, and recently in the second division, in the case of *McFarlane v. City of Brooklyn*, 122 N. Y. 589, has regarded a sale for unpaid taxes as a mode of enforcement of the city lien for taxes. In the case of *Williams v. Townsend*, 31 N. Y. 411, and *In re Clementi v. Jackson*, 92 N. Y. 591, the expressions in the opinions are unmistakable as to the effect of the sale upon the assessment lien upon property. In the former case Judge Davis holds that it is "merely an assignment of the lien of the tax. * * * and that lien continues till the owner makes the redemption, or the holder of

the certificate takes title to the property in the form prescribed. It is therefore, clear that the tax or assessment is not discharged by that sale and certificate. *In re Clementi v. Jackson*, Judge Rapallo held that the payments made by the purchaser at a tax sale were not payments of the taxes. He said: "The payments made by him were no more a payment of the taxes than would a payment he made by an assignee to an assignor of a bond, in consideration of the assignment thereof, be a payment of the bond."

In the case of *Sidenberg v. Ely*, 90 N. Y. 257, 263, 43 Am. Rep. 163, Judge Miller lays down the rule that "taxes paid may be added to the mortgage debt," and says, "numerous cases in the reports sustain this doctrine," citing *Eagle F. Ins. Co. v. Bell*, 2 Edw. Ch. (N. Y.) 621; *Burr v. Veeder*, 3 Wend. (N. Y.) 412; *Brevoort v. Randolph*, 7 How. (N. Y.) Pr. 398; *Fauer v. Winons*, 1 Hopk. Ch. (N. Y.) 283, 14 Am. Dec. 545; *Marshall v. Davies*, 78 N. Y. 414; *Robinson v. Ryan*, 25 N. Y. 320, and *Williams v. Townsend*, 31 N. Y. 411, 414, and adds: "These cases are cited by

The American and English Encyclopædia of Law⁴⁰ endorses the position of Mr. Jones by copying, without quotation marks, his exact language, but cites in addition to *Williams v. Townsend*, *Vincent v. Moore*,⁴¹ and *Brown v. Simmons*,⁴² neither of which support the proposition, and one, *Brown v. Simmons*, is an authority on the other side. In the case of *Vincent v. Moore*,⁴³ the supreme court of Michigan say that a mortgagee who, to protect his mortgage, redeems the mortgaged land from tax sale, and subsequently forecloses his mortgage under the power of sale, making no claim for the amount paid for taxes, and buys in the land for the amount of the mortgage debt, and the mortgagor redeems from such sale, the mortgagee cannot afterwards, by suit in equity, enforce a claim for the amount paid to redeem from the tax sale. It is plainly distinguishable from and not an authority for the doctrine to which it is cited. In the case of *Brown v. Simmons*,⁴⁴ it is said that a mortgagee in possession, taking

counsel for the appellant, and it is claimed they do not sustain the doctrine contended for. While all of them do not entirely cover, yet they tend to the support of the principle, that a mortgagee, who to save his mortgage and protect his security, is under the necessity of paying the taxes and assessments to prevent the property from being sold, should be allowed for the same as a part of his mortgage debt upon the foreclosure of his mortgage."

In *Cornell v. Woodruff*, 77 N. Y. 203, 206, *Williams v. Townsend* is cited as authority by Judge Rapallo in the following language: "These certificates of sales for taxes were liens upon the premises to the amount of the taxes, expenses of sale and interest at the rate allowed by law, on such sales. Until the

time for redemption expired and a lease should be executed the lien continued."

In *Ten Eyck v. Craig*, 62 N. Y. 406, 421, Judge Andrews cites *Williams v. Townsend* as authority to the proposition that "he (the mortgagee) may buy in any outstanding title and hold it against the mortgagor," citing *Cameron v. Irwin*, 5 Hill (N. Y.) 280; *Williams v. Townsend*, 31 N. Y. 411, 415; *Shaw v. Bonny*, 13 Week. R. 374, 2 D. G. J. & S. 468.

In *Lewis v. Duane*, 141 N. Y. 302, 313, *Williams v. Townsend* is cited to a point in relation to trusts.

⁴⁰ 20 Am. & Ency. of L. (1st ed.) 621.

⁴¹ 51 Mich. 618, 17 N. W. 618.

⁴² 44 N. H. 475.

⁴³ 51 Mich. 618, 17 N. W. 618.

⁴⁴ 44 N. H. 475.

rents and profits, can acquire no title as against the mortgagor or his assignee, by a purchase of the land at the collector's sale for the taxes upon it; but he may add the sum paid for such taxes to the mortgage debt as expenses necessarily incurred in protecting the estate.⁴⁵

Where a mortgagee has paid prior charges and incumbrances on the land to protect his title⁴⁶ on redemption by the mortgagor or any one claiming under him, the mortgagee will be entitled to receive this as a part of the mortgage debt;⁴⁷ but it is otherwise as to debts paid by the mortgagee, which are not charges upon the land and necessary to protect the lien of the mortgage.⁴⁸

⁴⁵ In this case it appears that on December 28, 1858, one Thayer entered into possession of the land under process, for the purpose of foreclosing the mortgage; on January, 15, 1859, the collector of taxes sold a part of the mortgaged premises, including the land in litigation, to Thayer for the taxes of 1858, and not having been redeemed within the year, Thayer conveyed the same to Simons, to whom he had previously assigned the mortgage; so that at the time of the sale and payment of the money for the taxes, Thayer was himself the holder of the mortgage, and in possession under it, although the taxes were assessed in April previous, and consequently before Thayer's entry. The court say: "The payment, then, was necessary to protect the estate, and the amount paid might unquestionably have been added to the mortgage debt, as expenses necessarily incurred by the mortgagee to protect the estate." Citing: *Mix v. Hotchkiss*, 14 Conn. 32; *Williams v. Hilton*, 35 Me. 354; *Page v. Foster*, 7 N. H. 392; *Kort-* Mortg. Vol. II.—100.

right v. Cady, 23 Barb. (N. Y.) 497; *Godfrey v. Watson*, 3 Atk. 518.

⁴⁶ See *post*, § 1204.

⁴⁷ See *Griggs v. Banks*, 59 Ala. 313; *Harper v. Ely*, 70 Ill. 581; *Hosford v. Johnson*, 74 Ind. 479; *Grant v. Parsons*, 67 Iowa, 31, 24 N. W. 578; *Arnold v. Foot*, 7 B. Mon. (Ky.) 66; *McSorley v. Larissa*, 100 Mass. 270; *Davis v. Wynn*, 84 Mass. (2 Allen) 111; *Daton v. Daton*, 68 Mich. 437, 36 N. W. 209; *Harrigan v. Welmuth*, 77 Mo. 542; *Johnson v. Payne*, 11 Neb. 269, 9 N. W. 81; *Weld v. Sabin*, 20 N. H. 533, 51 Am. Dec. 240; *Jenness v. Robinson*, 10 N. H. 215; *Page v. Foster*, 7 N. H. 392; *Robinson v. Leavitt*, 7 N. H. 100; *Madison Ave. Baptist Church v. Baptist Church in Oliver Street*, 73 N. Y. 82; *Robinson v. Ryan*, 25 N. Y. 320; *Silver Lake Bank v. North*, 4 John. Ch. (N. Y.) 370; *Benedict v. Gilman*, 4 Paige Ch. (N. Y.) 58; *Harpers's Appeal*, 64 Pa. St. 315; *Marson v. Robinson*, 31 Pa. St. 459; *Lyman v. Little*, 15 Vt. 576.

⁴⁸ See *Burnett v. Denniston*, 5 John. Ch. (N. Y.) 35; *McKinstry*

§ 1186. **Surrender of premises under statute.**—Under the statutes in some of the states,⁴⁹ it is a condition precedent to the right to redeem lands sold under mortgage foreclosure, that the possession of the land be delivered to the purchaser within a specified time from the date of the sale. The necessity to allege or prove a previous tender or surrender of the premises within the designated time arises where the statutory right existing after foreclosure is asserted, but not where the effort is to effectuate the equity of redemption.⁵⁰ Under such a statute, it has been held that redemption cannot be made by a householder who left on the premises some of his effects and a part of his family, who maintained an attitude of resistance to the purchaser's entry, and were, after the lapse of ten days, with their property, removed under legal process.⁵¹

§ 1187. **Allowance as attorney fees.**—We have already seen⁵² that payments of costs of suit is usually one of the conditions of redemption from a mortgage foreclosure; but redemption from a statutory foreclosure cannot be conditioned on the payment of an allowance, in the nature of attorney fees, beyond what is authorized by statute.⁵³ The exaction of such attorney fees, even where provided for in a power of sale, as a condition for redemption from a statutory foreclosure, is inconsistent with public policy, as are all stipulations for fees in advance, other than those allowed by statute.⁵⁴

v. *Mervin*, cited in 3 John. Ch. (N. Y.) 466; *Palmer v. Fowley*, 71 Mass. (5 Gray) 545; *Green v. Tanner*, 49 Mass. (8 Met.) 411; *Cleveland v. Clark*, Brayt. (Vt.) 165.

⁴⁹ As Ala. Code, § 1880.

⁵⁰ *Pryor v. Hollinger*, 88 Ala. 405, 6 So. 760.

⁵¹ *Nelms v. Kennon*, 88 Ala. 329, 6 So. 744.

⁵² See *ante*, § 1184.

⁵³ *Vosburgh v. Lay*, 45 Mich. 455, 8 N. W. 91. See *Parks v. Allen*, 42 Mich. 482, 4 N. W. 227; *Myer v. Hart*, 40 Mich. 517, 29 Am. Rep. 553; *Booth v. McQueen*, 1 Doug. (Mich.) 41.

⁵⁴ *Damon v. Deeves*, 62 Mich. 465, 29 N. W. 42. See *Sinclair v. Larned*, 51 Mich. 339, 340, 16 N. W. 672; *Millard v. Truax*, 50 Mich. 343, 15 N. W. 501; *Millard v. Truax*, 47 Mich. 251, 10 N. W. 358;

§ 1188. Notice of intention to redeem.—The statutes under which redemption may be made, in some of the states require that notice of the intention to redeem shall be given.⁵⁵ Where the statutes thus provide they should be strictly complied with in order to save all the rights of the party. It is provided in England that a mortgagee under a mortgage assigning to him the fund in court, subject to a prior life interest and the proviso for redemption, is entitled, if six months' notice of intention to pay off the mortgage has not been given, to six months' interest after the date of service upon him of a petition by the trustee of a settlement of the fund made after the death of the life tenant, to have the fund applied in payment of the mortgage, and the residue to such persons entitled, where such mortgagee has not demanded or taken any steps to compel payment.⁵⁶

§ 1189. Payment for improvements.—A purchaser in good faith of real estate on foreclosure of a prior mortgage who makes improvements on the property supposing his title to be good, is entitled to credit for the improvements thus made,⁵⁷ less the rents and profits which he has enjoyed,⁵⁸ as against the parties redeeming,⁵⁹ such as junior mortgagees, al-

Louder v. Burch, 47 Mich. 109, 10 N. W. 129; *Vosburgh v. Lay*, 45 Mich. 455, 8 N. W. 91; *Mayer v. Hart*, 40 Mich. 517, 29 Am. Rep. 553; *Van Marter v. McMillan*, 39 Mich. 304; *Hardwick v. Bassett*, 29 Mich. 17; *Sage v. Riggs*, 12 Mich. 313.

⁵⁵ See *Union Central Life Ins. Co. v. Rogers*, 155 Mo. 307, 55 S. W. 1019. See also *Sheridan v. Nation*, 159 Mo. 27, 59 S. W. 972.

In *North Dakota*, notice of redemption is unnecessary where the owner of the equity of redemption redeems. *Styles v. Dickey*, 134 N. W. 702. (N. D.).

⁵⁶ *Smith v. Smith*, (1891) 3 Ch. 550.

⁵⁷ See *Kinkead v. Peet*, 132 N. W. 1095. (Iowa).

⁵⁸ *Bradley v. Snyder*, 14 Ill. 263, 58 Am. Dec. 564; *McQueen v. Whetstone, as adm'r etc.* 127 Ala. 417, 30 So. 548, 137 Ala. 301, 34 So. 229.

⁵⁹ *Cable v. Ellis*, 120 Ill. 136, 11 N. E. 188; *Roberts v. Fleming*, 53 Ill. 193; *Bradley v. Snyder*, 14 Ill. 263, 58 Am. Dec. 564; *Troost v. Davis*, 31 Ind. 34; *Poole v. Johnson*, 62 Iowa, 611, 17 N. W. 900; *Montgomery v. Chadwick*, 7 Iowa 114; *McSorley v. Larissa*, 100 Mass.

though they were not made parties to the action.⁶⁰ But improvements cannot be made by a mortgagee in possession at the expense of a redemptioner,⁶¹ on the principle that he has no right to enhance the value of the estate and thus render it more difficult for the mortgagor, or those entitled to do so, to redeem.⁶² but where a party is not a *bona fide* purchaser without notice of existing equities, he is not entitled to pay for improvements made without an express consent or approval,⁶³ on the principle that those who expend money or labor upon the property of another, knowing that they are doing wrong, are voluntary servants and agents and lose what they thus expend.⁶⁴ And a person who buys mortgaged premises without actual knowledge of the existence of the mortgage, which is, however, recorded, and put betterments on the premises, will not be allowed therefor, except out of

270; *Barnard v. Jennison*, 27 Mich. 230; *Higginbottom v. Benson*, 24 Neb. 461, 8 Am. St. Rep. 211, 39 N. W. 418; *Vanderhaise v. Huges*, 13 N. J. Eq. (2 Beas.) 410; *Miner v. Beekman*, 50 N. Y. 337; *Mickle v. Dillay*, 17 N. Y. 80; *Fogal v. Pirro*, 10 Bosw. (N. Y.) 100; *Wetmore v. Roberts*, 10 How. (N. Y.) Pr. 51; *Putnam v. Ritchie*, 6 Paige Ch. (N. Y.) 390; *Benedict v. Gilman*, 4 Paige Ch. (N. Y.) 58; *Harder's Appeal*, 64 Pa. St. 315; *Green v. Westcott*, 13 Wis. 606; *Green v. Dixon*, 9 Wis. 532; *Fraser v. Prather*, 1 McA. (D. C.) 217; *Stillman v. Rosenbreg*, 78 N. W. 913. (Iowa).

But where the improvements are made after the action to redeem is brought, the rule does not apply. *Benson v. Bunting*, 141 Cal. 462, 75 Pac. 59.

⁶⁰ *Higginbottom v. Benson*, 24 Neb. 461, 8 Am. St. Rep. 211, 39

N. W. 418. See *Ensign v. Battersson*, 68 Conn. 298, 36 Atl. 51. See also *Jones v. Dutch*, 3 Neb. (Unof.) 673, 92 N. W. 735.

⁶¹ *Horn v. Indianapolis National Bank*, 125 Ind. 381, 25 N. E. 558, 9 L.R.A. 676, 21 Am. St. Rep. 231; *American Freehold Land Mortgage Co. v. Pollard*, 132 Ala. 155, 32 So. 630; *Lynch v. Ryan*, 137 Wis. 13, 129 Am. St. Rep. 1040, 118 N. W. 174; *Bradley v. Merrill*, 91 Me. 340, 40 Atl. 132. See also *McAbee v. Harrison*, 50 S. C. 39, 27 S. E. 539.

⁶² *Quinn v. Brittain*, 1 Hoff. Ch. (N. Y.) 353; *Moore v. Cable*, 1 John. Ch. (N. Y.) 385; *Bell v. New York*, 10 Paige Ch. (N. Y.) 49; *Holmes v. Grant*, 8 Paige Ch. (N. Y.) 252; *Putnam v. Ritchie*, 6 Paige Ch. (N. Y.) 390.

⁶³ *Witt v. Trustees*, 55 Wis. 380.

⁶⁴ *Silsbury v. McCoon*, 3 N. Y. 382, 53 Am. Dec. 307.

the surplus arising on foreclosure.⁶⁵ The reason for this is that the mortgage being recorded, is constructive notice to such purchaser.

§ 1190. **Right to assignment of mortgage.**—It has been said that the right to redeem a mortgage does not carry with it the right, upon such redemption, to an assignment of the mortgage and of the bond or other instrument evidencing the mortgage debt, or of either, unless the redeeming party has the position of surety, or can be regarded as surety for the mortgage debt;⁶⁶ but if the party redeeming occupies the position of surety, on the payment of the debt, he is entitled to an assignment, or effectual transfer of, the debt and of the bond or instrument evidencing the debt.⁶⁷

⁶⁵ *Whorton v. Moore*, 84 N. C. 479, 37 Am. Rep. 627.

⁶⁶ *Ellsworth v. Lockwood*, 42 N. Y. 89.

⁶⁷ *Ellsworth v. Lockwood*, 42 N. Y. 89. Citing *Mathews v. Aiken*, 1 N. Y. 595; *Hayes v. Ward*, 4

John. Ch. (N. Y.) 123, 8 Am. Dec. 554; *King v. Baldwin*, 2 John. Ch. (N. Y.) 554; *Speiglemyer v. Crawford*, 6 Paige Ch. (N. Y.) 257; *New York State Bank v. Fletcher*, 5 Wend. (N. Y.) 85.

CHAPTER XLIII.

REDEMPTION—SUM PAYABLE ON.

- § 1191. Amount payable—Generally.
- § 1192. Same—By mortgagor.
- § 1193. Same—Same—Where not made party.
- § 1194. Same—Same—On redeeming from subsequent lienor-purchaser.
- § 1195. Same—By assignee of mortgagor.
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- § 1197. Same—By junior lienor.
- § 1198. Same—Same—Where not made party.
- § 1199. Same—By tenant in common.
- § 1200. Same—From subsequent lienor and redemptioner.
- § 1201. Consolidation of liens—Tacking.
- § 1202. Error in ascertaining amount.
- § 1203. In case of usurious interest.
- § 1204. Sum paid to protect title.
- § 1205. Permanent improvements—To be paid for, when.
- § 1206. Rents and profits—Applicable on sum payable, when.
- § 1207. Costs on—Attorney's fees.

§ 1191. Amount payable—Generally.—The general rule is that any one seeking to redeem property after a foreclosure sale must pay or tender the full amount of the mortgage debt,⁶⁸ regardless of what the property may have brought,⁶⁹ except in those cases where the deficiency has been paid by the

⁶⁸ With interest. *Clark as adm'r etc. v. Seagraaves adm'r.* 186 Mass. 430, 71 N. E. 813.

⁶⁹ *Horn v. Indianapolis National Bank*, 125 Ind. 381, 25 N. E. 558, 9 L.R.A. 676, 21 Am. St. Rep. 231; *Duke v. Benson*, 79 Ind. 24; *Johnson v. Harman*, 19 Iowa, 56; *Lee v. Stone*, 5 Gill. & J. (Md.) 1, 23 Am. Dec. 589; *Way v. Mullett*, 143

Mass. 49, 8 N. E. 881; *Powers v. Golden Lumber Co.* 43 Mich. 468, 5 N. W. 656; *Martin v. Fridley*, 23 Minn. 13; *Swearington v. Roberts*, 12 Neb. 333, 11 N. W. 325; *Raynor v. Selmes*, 52 N. Y. 579; *Collins v. Riggs*, 81 U. S. (14 Wall.) 49, 20 L. ed. 723; *Dougherty v. Kubat*, 67 Neb. 269, 93 N. W. 317; *Shumate as adm'r etc. v. McLendon*, 120 Ga.

person equitably bound to pay the same.⁷⁰ In those cases where a law changing the rate of interest on bids at mortgage sales applies to all sales made thereafter, a purchaser at mortgage foreclosure will be entitled to receive the rate of interest prescribed by the law in force at the time when he purchased.⁷¹

§ 1192. **Same—By mortgagor.**—A mortgagor seeking to redeem must pay the whole amount due upon the mortgage, and will usually be allowed to redeem upon paying that amount, although indebted to the mortgagee on other accounts;⁷² but where it appears to the court that the parties agreed that the mortgage should be held as security for a new and different debt from that set out, a court of equity will not aid the mortgagor, or permit him, to redeem until he does equity and pays the debt intended to be secured by the mortgage, according to the agreement and real equities between the parties.⁷³ On such redemption the mortgagor will not be

396, 48 S. E. 10; *Evans v. Kahr*, 60 Kan. 719, 57 Pac. 950, 58 Pac. 467. See also *Kinkead v. Peet*, 132 N. W. 1095. (Iowa); *Oakman v. Walker*, 69 Vt. 344, 38 Atl. 63.

In *Alabama* it is held that a judgment creditor of the mortgagor need not pay the balance of the mortgage debt in order to redeem. *Williams v. Rouse*, 124 Ala. 160, 27 So. 16; *First National Bank v. Elliott*, 125 Ala. 646, 47 L.R.A. 742, 82 Am. St. Rep. 268, 27 So. 7.

⁷⁰ *Bradley v. Snyder*, 14 Ill. 263, 58 Am. Dec. 564; *Hosford v. Johnson*, 74 Ind. 479; *Knowles v. Rablin*, 20 Iowa, 101; *Johnson v. Harman*, 19 Iowa, 56; *Stoddard v. Forbes*, 13 Iowa, 296, 300; *White v. Hampton*, 13 Iowa, 259, 264; *Powers v. Golden Lumber Co.* 43 Mich. 468, 5 N. W. 656; *Baker v.*

Powers, 6 Mich. 522; *Martin v. Fridley*, 23 Minn. 13; *Gage v. Brewster*, 31 N. Y. 218; *Vroom v. Ditmas*, 4 Paige Ch. (N. Y.) 526, 531; *Collins v. Riggs*, 81 U. S. (14 Wall.) 491, 20 L. ed. 723.

⁷¹ *Connecticut Mut. L. Ins. Co. v. Cushman*, 108 U. S. 51, 27 L. ed. 648.

⁷² *Stallings v. Thomas*, 55 Ark. 326, 18 S. W. 184; *Lee v. Stone*, 5 Gill & J. (Md.) 1, 23 Am. Dec. 589; *Taft v. Stoddard*, 142 Mass. 545, 8 N. E. 586; *Merritt v. Hosmer*, 77 Mass. (11 Gray) 276, 71 Am. Dec. 713; *Dickerson v. Hayes*, 26 Minn. 100, 1 N. W. 834; *Loney v. Courtney*, 24 Neb. 580, 39 N. W. 616.

⁷³ *Taft v. Stoddard*, 142 Mass. 545, 8 N. E. 586; *Upton v. National Bank of So. Reading*, 120 Mass.

required to account for the rents and profits during his occupation even where, after entry for breach of condition, he occupies the mortgaged premises under an agreement to pay a stipulated rent, which he neglects to do;⁷⁴ but will be chargeable with interest and with taxes paid and necessary repairs made, together with costs of proper improvements,⁷⁵ but not with the costs of the sale where invalid,⁷⁶ and will be entitled to credit for the reasonable rents and profits of the land.⁷⁷ In those cases where there has been a foreclosure for more than is actually due, the mortgagor may, in an action to redeem, be allowed to do so, on proper showing, by paying the amount justly due on the mortgage; but he must also show an excuse for not applying to the court before the sale and preventing a foreclosure for more than was due.⁷⁸ But in a case where the mortgagee obtained judgment on an overdue note secured by mortgage, authorizing a sale on foreclosure and providing that any surplus should be applied in satisfaction of the mortgage notes not yet due, and the mortgagee bid in the property

153; *Stone v. Lane*, 92 Mass. (10 Allen) 74; *Joslyn v. Wyman*, 87 Mass. (5 Allen) 62; *Carpenter v. Plagge*, 192 Ill. 82, 61 N. E. 530.

⁷⁴ *Harrison v. Wise*, 24 Conn. 1, 63 Am. Dec. 151; *Merritt v. Hosmer*, 77 Mass. (11 Gray) 276, 71 Am. Dec. 713.

Mortgagors may be decreed to account for rents and profits of the mortgaged premises to the mortgagees, where by an appeal they have for a long time kept the mortgagees out of such rents and profits. *Bank of Utica v. Finch*, 3 Barb. Ch. (N. Y.) 293, 49 Am. Dec. 175.

⁷⁵ *Stallings v. Thomas*, 55 Ark. 326, 18 S. W. 184; *Loney v. Courtney*, 24 Neb. 580, 39 N. W. 616; *Dickerson v. Hayes*, 26 Minn. 100, 1 N. W. 834.

As an offset will be entitled to credit for the reasonable rents and profits of the land. *Stallings v. Thomas*, 55 Ark. 326, 18 S. W. 184.

Where the decree in a void mortgage foreclosure was in part paid by other means, and the land purchased by the mortgagee for considerably less than the amount of the decree, the mortgagor in redeeming must pay the purchase price, with interest and taxes. *Stallings v. Thomas*, 55 Ark. 326, 18 S. W. 184; *Loney v. Courtney*, 24 Neb. 580, 39 N. W. 616.

⁷⁶ See *Rodman v. Quick*, 211 Ill. 546, 71 N. E. 1087.

⁷⁷ *Stallings v. Thomas*, 55 Ark. 326, 18 S. W. 184.

⁷⁸ *Dickerson v. Hayes*, 26 Minn. 100, 1 N. W. 834.

for more than the amount of the judgment, it was held that the mortgagor could not redeem on paying the amount of the judgment, but that he must pay the amount of the bid, notwithstanding the fact that the mortgagee had not paid the money into court.⁷⁹

It is the general rule that a mortgagor who goes into equity to redeem must do equity before he can sustain his bill.⁸⁰ He will not be permitted to redeem except upon the payment of the debt actually intended to be secured according to the agreement and real equities between the parties whether that debt is the one secured in the mortgage or not,⁸¹ also upon payment of all collateral debts due from him to the mortgagee, though not included in the mortgage.⁸²

§ 1193. Same—Same—Where not made party.—Under those statutes vesting in the mortgagor, unless the mortgage stipulates to the contrary, the legal title and right of possession, in an action by a mortgagor, who was not made a party to the action to foreclose, to redeem from the foreclosure sale, the amount necessary to redeem should be de-

⁷⁹ *Williamson v. Dickerson*, 66 Iowa 105, 23 N. W. 286.

⁸⁰ *Chamberlain v. Thompson*, 10 Conn. 243, 26 Am. Dec. 390; *Lee v. Stone*, 5 Gill & J. (Md.) 1, 23 Am. Dec. 589; *Loney v. Courtney*, 24 Neb. 580, 39 N. W. 616; *Comstock v. Johnson*, 46 N. Y. 615; *Cassler v. Shipman*, 35 N. Y. 533; *McDonald v. Neilson*, 2 Cow. (N. Y.) 139, 14 Am. Dec. 431; *Tripp v. Cook*, 26 Wend. (N. Y.) 143; *Finch v. Finch*, 10 Ohio St. 501, 507; *Cowlin v. Hartwell*, 5 Clark & F. 484; *Whitaker v. Hall*, 1 Glyn & J. 213; *Hanson v. Keating*, 4 Hare, 1, 5, 6; *MacKenna v. Fidelity Trust Co. of Buffalo*, 184 N. Y. 411, 3 L.R.A. (N.S.) 1068, 112 Am. St. Rep. 620,

77 N. E. 721. See also *Rich v. Morisey as exr. etc.* 149 N. C. 37, 62 S. E. 762.

⁸¹ *Taft v. Stoddard*, 142 Mass. 545, 8 N. E. 586; *Upton v. National Bank of So. Reading*, 120 Mass. 153; *Stone v. Lane*, 92 Mass. (10 Allen) 74; *Joslyn v. Wyman*, 87 Mass. (5 Allen) 62; *Ford v. Davis*, 168 Mass. 116, 46 N. E. 435. See also *Weller v. Summers*, 82 Minn. 307, 84 N. W. 1022.

⁸² *Anthony v. Anthony*, 23 Ark. 479; *Chamberlain v. Thompson*, 10 Conn. 243, 26 Am. Dec. 390; *Lee v. Stone*, 5 Gill & J. (Md.) 1, 23 Am. Dec. 589. See also *Saunders v. Savage*, 63 S. W. 218. (Tenn.).

terminated with reference both to the right to rents and profits and the liability to pay for improvements.⁸³

§ 1194. Same—Same—On redeeming from subsequent lienor-purchaser.—In accordance with the doctrine heretofore laid down,⁸⁴ it has been held that where a mortgagee purchases the mortgaged land at a judicial sale, made for the purpose of enforcing the claim of a third person against the mortgagor, under an agreement to reconvey it to the mortgagor when the latter pays him the amount of the mortgage debt, together with the sum expended in the purchase of the land, before a court, which has jurisdiction of the land and the parties, will decree a reconveyance, it will see that the amount of a judgment against the mortgagor, which was a lien on the land in favor of the mortgagee at the time of the purchase, is paid, as well as the mortgage debt and the advances.⁸⁵

§ 1195. Same—By assignee of mortgagor.—We have heretofore seen⁸⁶ that a mortgagor coming into equity to redeem the mortgage must pay not only the debt intended to be secured by the mortgage, whether that is the debt described in the mortgage or not, but also all collateral debts between the parties. The rights of an assignee of a mortgagor are not superior to those of the mortgagor himself,⁸⁷ consequently the same principle applies to a bill to

But where the mortgagee seeks a foreclosure in chancery, the mortgagor is permitted to redeem upon payment of the mortgage debt alone. *Anthony v. Anthony*, 23 Ark. 479.

But a widow, redeeming from a mortgage in which she joined, cannot be required to pay a second mortgage to the same mortgagee, in which she did not join. *Hays v. Cretin*, 102 Md. 695, 4 L.R.A.(N.S.) 1039, 62 Atl. 1028.

As to amount to be paid by dowress, see *Merselis v. Van Riper*, 55 N. J. Eq. 618, 38 Atl. 196.

⁸³ *Barrett v. Blackmar*, 47 Iowa. 565.

⁸⁴ See *ante*, § 1192.

⁸⁵ *Hinon v. Pritchard*, 107 N. C. 128, 12 S. E. 242, 10 L.R.A. 401.

⁸⁶ See *ante*, § 1192.

⁸⁷ *Saunders v. Frost*, 22 Mass. (5 Pick.) 259, 16 Am. Dec. 394.

redeem brought by the grantee of the mortgagor with a knowledge of the facts; and the administrator of the latter stands in no better position.⁸⁸

§ 1196. **Same—By third party interested.**—In a case where defendants having condemned, by exercise of the right of eminent domain, a part of lands covered by a mortgage, without making the mortgagee a party, and the latter afterwards foreclosed his mortgage without making such defendants parties, and having bought the land at a price which left a large balance due, brought suit to compel the defendants to redeem. The court held that they could not redeem by paying a portion of the mortgage debt proportionate to the value of the land they had condemned to the whole tract, but that they must pay the full amount.⁸⁹

§ 1197. **Same—By junior lienor.**—We have already seen where the mortgagee seeks to foreclose in equity, the mortgagor will be permitted to redeem upon payment of the mortgage debt only, no matter to what amount, on other accounts, he may stand indebted to the mortgagee. And it is equally well settled that a subsequent mortgagee or judgment creditor seeking to redeem, will generally be permitted to do so upon payment of the mortgage debt alone.⁹⁰ It has been said that upon the redemption by a second mortgagee from a first who is in possession, the latter should be credited on account with such reasonable counsel fees as he was obliged

⁸⁸ *Taft v. Stoddard*, 142 Mass. 543, 8 N. E. 586; *Stone v. Lane*, 92 Mass. (10 Allen) 74; *Joslyn v. Wyman*, 87 Mass. (5 Allen) 62.

⁸⁹ *Mutual Life Ins. Co. v. Easton & A. R. Co.* 38 N. J. Eq. (11 Stew.) 132.

The right of a railroad to redeem from a mortgage by paying

portion of the debt the amount of land held by them bears to the amount of the tract mortgaged, was fully discussed. *Ante*, § 1180.

⁹⁰ *Lee v. Stone*, 5 Gill S. J. (Md.) 1, 23 Am. Dec. 589; *Saunders v. Frost*, 22 Mass. (5 Pick.) 259, 16 Am. Dec. 394.

to pay in collecting the rents and profits, and he is not liable for damages done to the land by his tenant, without his knowledge, if the tenant is a proper person to lease to; nor for wood, in reasonable quantities, cut and used by such tenant for fuel and repairs.⁹¹ In those cases where a second mortgagee, on seeking to redeem from a prior mortgage, tendered the proper amount on demanding an assignment of the mortgage, and renewed the tender when the senior mortgagee began foreclosure proceedings, the second mortgagee will not be justly chargeable with costs for omitting to keep good the tender in a bill to enforce his right to redeem.⁹² There are instances, however, in which the equities of the case will require that junior lienors seeking to redeem shall pay prior liens.⁹³ Thus it has been said that where A is a first mortgagee, B is a second mortgagee and B, C and D are third mortgagees, and B assigns to A the second mortgage and all his interest in the third mortgage, C and D cannot redeem from A on account of the second mortgage without paying him also the amount of the first mortgage.⁹⁴ This is on the principle that a mortgagee who has paid a prior mortgage, or other incumbrance upon the land, is entitled to be repaid the sum so advanced, when the mortgagor, or other person claiming under him, comes in to redeem.⁹⁵

It is thought that where land is sold under a mortgage foreclosure for a sum less than the amount of the judgment,

⁹¹ *Hubbard v. Shaw*, 94 Mass. (12 Allen) 120.

⁹² *Lamb v. Jeffrey*, 41 Mich. 719, 3 N. W. 204.

As to costs on redemption from a foreclosure under a mortgage and sale of the land. See *post*, § 1243.

⁹³ *Duke v. Beeson*, 79 Ind. 24; *Saunders v. Frost*, 22 Mass. (5 Pick.) 259, 16 Am. Dec. 394; *McCormick v. Knox*, 105 U. S. 122, 26 L. ed. 940.

⁹⁴ *Saunders v. Frost*, 22 Mass. (5 Pick.) 259, 16 Am. Dec. 394.

⁹⁵ *McCormick v. Knox*, 105 U. S. 122, 26 L. ed. 940. See *Harper v. Ely*, 70 Ill. 581; *Arnold v. Foot*, 7 B. Mon. (Ky.) 66; *Paige v. Foster*, 7 N. H. 392; *Robinson v. Ryan*, 25 N. Y. 320; *Redmond v. Burroughs*, 63 N. C. 242.

and a junior incumbrancer, comes in to redeem, he will be required to pay the full amount of the judgment.⁹⁶

§ 1198. Same—Same—Where not made party.—The amount which must be paid to redeem by a junior incumbrancer who was not made a party to the foreclosure of the senior mortgage, is to be determined from the mortgage and not from the decree.⁹⁷ Such a mortgagee not made a party to the foreclosure and sale under a prior mortgage cannot, in an action to require him to redeem or be foreclosed, be required to pay the costs of foreclosure of the former mortgage, or to submit to any unusual exactions as a condition of redeeming.⁹⁸ Neither can he be required to pay for improvements put upon the mortgaged premises by a purchaser at such sale with notice of the existence of his mortgage and that it had not been foreclosed.⁹⁹ And where the purchaser at a foreclosure sale, removes, without injury to the premises, a house he had built thereon before redemption, a junior mortgagee not a party to the foreclosure, is not bound to pay the value of the house in order to redeem.¹

§ 1199. Same—By tenant in common.—The general rule, believed to be without an exception, is that a tenant in common of an equity of redemption, if he redeems, must pay the whole mortgage debt, and cannot compel the mortgagee to accept such portion of the mortgage debt as is represented by his interest in the land. And having paid the whole mortgage debt, he has no right of contribution against his co-tenants personally, but his only remedy is by a foreclosure of their interests in the land, if they fail to pay

⁹⁶ *Duke v. Beeson*, 79 Ind. 24.
See *ante*, §§ 1191, 1196.

⁹⁷ *Johnson v. Hosford*, 110 Ind. 572, 10 N. E. 407.

⁹⁸ *Moulton v. Cornish*, 61 Hun (N. Y.) 438, 41 N. Y. S. R. 41, 16 N. Y. Supp. 267.

⁹⁹ *Moulton v. Cornish*, 61 Hun (N. Y.) 438, 41 N. Y. S. R. 41, 16 N. Y. Supp. 267.

¹ *Poole v. Johnson*, 62 Iowa, 611, 17 N. W. 900.

their share; and they have the option to pay or give up their interests.²

§ 1200. Same.—From subsequent lienor and redemptioner.—In keeping with the general principles already laid down in this chapter, a subsequent mortgagee or other subsequent lienor who has paid a prior mortgage or other incumbrance, is entitled to be repaid when the mortgagor or his vendee, or a subsequent lienor, comes in to redeem.³ Thus it is said that a judgment creditor who has redeemed from a foreclosure sale five tracts of land sold separately under the decree of foreclosure, is entitled to have the entire amount of his judgment, instead of a proportionate part thereof, paid upon a redemption of one or more of the tracts of land, under the Iowa Code,⁴ providing that the terms of redemption in all cases shall be the reimbursement of the amount paid by the holder “added to the amount of his own lien” with interests and costs.⁵ And in a case where a junior mortgagee purchases the senior mortgage after sale thereunder, and more than six and less than nine months thereafter, pays the purchaser the amount of his bill, with interest, takes an assignment of the certificate of sale, files an affidavit with the clerk, setting out his mortgage lien and stating that he has redeemed as junior lienholder, and also obtains a deed from the sheriff, —neither the owner of the land nor a purchaser with knowledge of the junior mortgagee’s rights can thereafter redeem without paying both mortgages, until he has established a defense to the junior mortgage.⁶ In those cases where the property is amply sufficient for all the liens the court will not, at the instance of a subsequent lien-holder, who redeems from a prior lien-holder and redemptioner, undertake to inquire

² *Lyon v. Robbins*, 45 Conn. 513.

N. W. 333. See *Woonsocket Sav.*

³ *McCormick v. Knox*, 105 U. S. 122, 26 L. ed. 940.

Inst. v. Goulden, 28 Fed. 900.

⁴ Ia. § 2106.

⁶ *Lamb v. West*, 75 Iowa, 399, 39 N. W. 666.

⁵ *Case v. Fry*, 91 Iowa, 132, 59

into the validity of amount due on prior liens, in order to enhance the value of the property in the hands of the last redemptioner.⁷

§ 1201. **Consolidation of claims—Tacking.**—There are cases where several liens may be united in one action, and persons seeking to redeem are required to pay all. Thus one who has executed to different persons two mortgages upon the same land, cannot after the second mortgage has been foreclosed, and the title under both mortgages united in one person, be let in to redeem from the second mortgage upon payment of the sum secured by the first mortgage.⁸ The holder of a purchaser's interest upon a foreclosure or execution sale, in order to tack a subsequent lien to it for the purposes of redemption, must place himself in the line of redemptioners with respect to such subsequent lien, by complying with the statute regulating in the particular instance.⁹ We have already seen that a mortgagor coming into equity to redeem must do equity and pay all debts owing from him to the mortgagee;¹⁰ also that a junior incumbrancer redeeming will be allowed to add to his own claim the amount necessarily paid out and expended in redeeming and preserving the property and his lien.¹¹ The old English doctrine of "tacking" has been abolished in this country, and where tacking to any degree is permitted, it will never be allowed to the injury

⁷ *Parker v. St. Martin*, 53 Minn. 1, 55 N. W. 113.

⁸ *Butler v. Seward*, 92 Mass. (10 Allen) 466.

⁹ *Buchanan v. Reid*, 43 Minn. 172, 45 N. W. 11.

In *England* the right of mortgagees holding several mortgages executed by the same mortgagor, although on different property, to consolidate them so that all must be redeemed together if redeemed at all, where they have ex-

cluded the application of the English Conveyancing and Law of Property Act 1881, § 17, is not defeated by the fact that they have given notice, under § 20, to the mortgagor to pay off one of the mortgages in order to acquire a power of sale, and he has prepared for the payment and tendered the money. *Griffith v. Pound*, L. R. 45 Ch. Div. 553.

¹⁰ See *ante*, § 1192.

¹¹ See *ante*, § 1197.

of other creditors.¹² Thus it has been said that the liens of one whose land has been sold under a decree of chancery for the payment of debts, seeking to enforce against the purchaser their lien for an unpaid balance of the purchase money, by a resale of the premises, cannot tack to it a claim against the purchaser as surety on the bond of their guardian for sums previously paid to and squandered by him, to the exclusion of lien creditors of such purchaser.¹³

§ 1202. **Errors in ascertaining amount.**—It is said that an error in ascertaining the amount necessary to redeem land sold under mortgage foreclosure will not defeat the right of the redemptioner, who pays the amount called for in the sheriff's deed, as against the mortgagee, who becomes purchaser at the sale;¹⁴ particularly is this the case where the error is occasioned by the mistake of the mortgagee's attorney in stating to the sheriff the rate of interest specified in the mortgage, and where, though the mortgagee knew of the facts several days before the time of redemption, he took no steps to notify the redemptioner.¹⁵

§ 1203. **In case of usurious interest.**—We have already seen¹⁶ that a person coming in to redeem from a mortgage foreclosure is entitled to be credited with the statutory penalty on account of usurious interest, so far as the same has not

¹² *Coombe v. Jordan*, 3 Bland Ch. (Md.) 284, 22 Am. Dec. 236.

¹³ *Lee v. Stone*, 5 Gill & J. (Md.) 1. 23 Am. Dec. 589.

¹⁴ *Day v. Cole*, 44 Iowa, 452; *Dodge v. Kennedy*, 93 Mich. 547, 53 N. W. 795.

Thus in case where, in the decree of foreclosure, the note was, by mistake, assessed at less than its true amount, and the plaintiff pur-

chased the property at execution sale for the amount appearing to be due upon the judgment and costs, the court held that a junior incumbrancer was entitled to redeem upon payment of the amount bid at the sale. *Day v. Cole*, 44 Iowa, 452.

¹⁵ *Dodge v. Kennedy*, 93 Mich. 547, 53 N. W. 795.

¹⁶ See *ante*, § 1178.

been paid; but no deduction from the incumbrance can be made for usurious interest already paid by the former owner.¹⁷

The assignee of equity of redemption in case of a mortgage tainted with usury is entitled to the aid of equity to redeem proffering to pay the mortgage debt and simple interest thereon, or by bringing the same into court to be paid to the mortgagee.¹⁸

§ 1204. Sum paid to protect title.—When a mortgagee has been compelled to pay additional sums of money to protect the estate from forfeiture in consequence of the laches of the mortgagor, to redeem, such mortgagor and those claiming under him must repay such additional sums.¹⁹ Thus such mortgagee will be allowed for any taxes which may have been paid by him upon the land,²⁰ as well as the amount of money paid by such mortgagee to protect his interest and to redeem said land from a prior sale for delinquent taxes; the amount paid for such redemption being a lien upon the land as against one who redeems from him, on personal liability of the holder of the legal title for the taxes not affecting the land.²¹

§ 1205. Permanent improvements—To be paid for, when.—It is a well settled principle that, when one who

¹⁷ *Perrine v. Poulson*, 53 Mo. 309. See *Kirkpatrick v. Smith*, 55 Mo. 389.

¹⁸ *Banks v. McClellen*, 24 Md. 62, 87 Am. Dec. 594.

¹⁹ *Gable v. Seibin*, 137 Ind. 155, 36 N. E. 844; *Goodrich v. Friedersdorff*, 27 Ind. 308; *Williams v. Hilton*, 53 Me. 547, 58 Am. Dec. 727; *Skilton v. Roberts*, 129 Mass. 309. See *Bourgeois v. Gapen*, 58 Neb. 364, 78 N. W. 639.

²⁰ *Goodrich v. Friedersdorff*, 27 Ind. 308.

²¹ *Gable v. Seibin*, 137 Ind. 155, 36 N. E. 844. See *ante*, § 1185.

Redemption from tax sale by mortgagee after the sale under the mortgage is held in some states not to entitle the mortgagee to recover the sums paid on such tax redemption. *Skilton v. Roberts*, 129 Mass. 309; *Nopson v. Horton*, 20 Minn. 263.

But these cases are not regarded as sound in principle, the tax certificate being simply a transfer of the lien and not a payment of the taxes. See *ante*, § 1185

should have been made a party is omitted from judicial proceedings, the rights of such omitted person remain precisely as they were before the proceedings were instituted; they are neither enlarged nor diminished thereby.²² Consequently, the obligation of such party redeeming to pay for improvements will not be affected by such sale unless the party seeking to redeem has been guilty of some act or laches in relation to the matter. The general rule in equity is that a mortgagor seeking to redeem from a mortgagee cannot be required to pay for permanent improvements.²³ But there are exceptions to this general rule in those cases where it would be inequitable or unjust to enforce it, as where the party takes possession in good faith under the belief that he is sole owner, with the consent, expressed or implied, of the mortgagor or junior lien holder, or where they have, for a considerable length of time, failed to assert their right to redeem, to permit this to be done, except on condition that permanent improvements be paid for;²⁴ and the fact that the purchaser had constructive notice of the rights of the junior lienholder is immaterial.²⁵

In those cases where the mortgagor or owner of the equity of redemption, or a junior lienholder, redeems after foreclosure and sale, to which he was not made a party, under such circumstances as to entitle the purchaser who has en-

²² *McGough v. Sweetzer*, 97 Ala. 361, 12 So. 162, 19 L.R.A. 470.

²³ *American Buttonhole, etc. Co. v. Burlington Mut. Loan Assoc.* 68 Iowa, 326, 27 N. W. 271; *Montgomery v. Chadwick*, 7 Iowa, 114; *Moore v. Cable*, 1 John. Ch. (N. Y.) 384; *Lynch v. Ryan*, 137 Wis. 13, 129 Am. St. Rep. 1040, 118 N. W. 174. See also *Shelley, as ex'r etc. v. Cody*, 187 N. Y. 166, 79 N. E. 994.

²⁴ *Roberts v. Fleming*, 53 Ill. 198; *Frost v. Davis*, 31 Ind. 34; *American Buttonhole, etc. Co. v. Burling-*

ton Mut. Loan Assoc. 68 Iowa, 326, 27 N. W. 271; *Montgomery v. Chadwick*, 7 Iowa, 114; *Bacon v. Cottrell*, 13 Minn. 194; *Mickles v. Dillaye*, 17 N. Y. 80; *Greene v. Dixon*, 9 Wend. (N. Y.) 485; *Gillis v. Martin*, 2 Dev. (N. C.) Eq. 470, 25 Am. Dec. 729. See *Parnell v. Goff*, 122 Pac. 653 (Okla.); *Ensign v. Batterson*, 68 Conn. 298, 36 Atl. 51.

²⁵ *American Buttonhole, etc. Co. v. Burlington Mut. Loan Assoc.* 68 Iowa, 326, 27 N. W. 271; *Mickles v. Dillaye*, 17 N. Y. 80.

tered into possession to be paid the value of improvements made by the purchaser, such redemptioner will be entitled to offset against the value of such improvements the rents and profits received by the purchaser.²⁶

§ 1206. Rents and profits—Applicable on sum payable, when.—The question of accounting for rents and profits on redemption having already been discussed in the chapter on terms and conditions on which redemption may be allowed,²⁷ it remains but to consider when the redemptioner is entitled to have rents and profits applied on, or deducted from, the sum payable on redemption. We have already seen²⁸ that where improvements of a permanent character have been made on the land by the purchaser, under such circumstances that he is entitled to be compensated therefor, the redemptioner is entitled to have deducted from this amount the rents and profits the property would reasonably have earned.

The general rule is that the mortgagor is entitled to redeem without paying rent, where he has been permitted to remain in possession of the mortgaged premises;²⁹ but where the mortgagee has taken and received the rents and profits of the mortgaged premises, on redemption, the mortgagor is entitled to have applied in reduction of the sum to be paid the net proceeds of such rents and profits as were received, or as might have been received by the exercise of

²⁶ See *McGough v. Sweetzer*, 97 Ala. 361, 12 So. 169, 19 L.R.A. 470; *McCabe v. Bellows*, 73 Mass. 148. 66 Am. Dec. 467; *Newton v. Cook*, 70 Mass. (4 Gray) 46; *Brown v. Lapham*, 57 Mass. (3 Cush.) 554; *Gibson v. Crehore*, 22 Mass. (5 Pick.) 146; *Van Duyne v. Shann*, 39 N. J. Eq. (12 Stew.) 6; *Mills v. Van Voorhies*, 20 N. Y.

412; *Denton v. Nanny*, 8 Barb. (N. Y.) 618; *Ross v. Boardman*, 22 Hun (N. Y.) 527.

²⁷ See *ante*, § 1183.

²⁸ See *ante*, §§ 1189, 1195.

²⁹ *Merritt v. Hosmer*, 77 Mass. (11 Gray) 276, 71 Am. Dec. 713. See *Harrison v. Wyse*, 24 Conn. 1, 63 Am. Dec. 151.

due diligence,³⁰ together with interest thereon, in some states.³¹ but in other states not.³² But a mortgagee in possession will

³⁰ *Harrison v. Wyse*, 24 Conn. 1, 63 Am. Dec. 151. See *Powell v. Williams*, 14 Ala. 476, 48 Am. Dec. 105; *Hogan v. Stone*, 1 Ala. 496, 35 Am. Dec. 39; *Benham v. Rowe*, 2 Cal. 387, 56 Am. Dec. 342; *Breckinridge v. Brooks*, 2 A. K. Marsh. (Ky.) 335, 12 Am. Dec. 401; *Schaeffer v. Chambers*, 6 N. J. Eq. (2 Halst.) 548, 47 Am. Dec. 211; *Gillis v. Martin*, 2 Dev. (N. C.) Eq. 470.

American Freehold Land Mortgage Co. v. Pollard, 132 Ala. 155, 32 So. 630; *Miller v. Peter*, 158 Mich. 336, 122 N. W. 780. See *National Mutual Building & Loan Ass'n v. Houston*, 81 Miss. 386, 32 So. 911; *Long v. Richards*, 170 Mass. 120, 64 Am. St. Rep. 281, 48 N. E. 1083; *Eldridge v. Hoefler*, 52 Or. 241, 96 Pac. 1105. See also *Bourgeois v. Gopen*, 58 Neb. 364, 78 N. W. 639, where the property had no rental value.

A mortgagee in possession must account not only for the rents, but for the damages and costs recovered in ejectment suit, and for what the mortgagor would have realized from the crops growing on the premises at the time of the ouster, less the probable cost of cultivation. *Powell v. Williams*, 14 Ala. 476, 48 Am. Dec. 105.

A mortgagee should not be charged with rents which accrue from improvements he made upon the mortgaged premises. *Gillis v. Martin*, 2 Dev. (N. C.) Eq. 470.

³¹ *Breckinridge v. Brooks*, 2 A. K. Marsh. (Ky.) 335, 12 Am. Dec. 401; *Gibson v. Crehore*, 22 Mass. (5

Pick.) 146; *Kinhead v. Peet*, 132 N. W. 1095. (Iowa).

³² *Hogan v. Stone*, 1 Ala. 496, 35 Am. Dec. 39; *Schaeffer v. Chambers*, 6 N. J. Eq. (2 Halst.) 547, 47 Am. Dec. 211.

In the case of *Hogan v. Stone*, 1 Ala. 496, 35 Am. Dec. 39, the court considered the question of interest on rents, and said, among other things: "In England, where interest is not charged on the account taken of the rents and profits, unless there be some peculiarity in the case; as where no interest is in arrears, when the mortgagee takes possession: *Shepard v. Elliott*, 4 Madd. 254; or where the rent greatly exceeds the interest of the mortgage debt; in which event annual rents are directed to be made, and after the payment of the interest, the excess is applied to sink the principal: See the cases cited in which this principle is established, in *Powell on Mortgages*, 949a, and *Coote on Mortgages*, 556. So in the case of *Breckinridge v. Brooks*, 2 A. K. Marsh. (Ky.) 340, 12 Am. Dec. 401, which was elaborately considered on a rehearing, it was determined that the mortgagee in possession was not chargeable with interest on rent received. These decisions, in our opinion, are founded in justice. The mortgagor can, at any time, regain the possession of the property by paying the debt. If he does not do so, and the mortgagee is at the trouble of paying himself it is not reasonable that he should be charged with interest on the amount thus received, in

not be liable for not leasing the property differently, and for rents and profits he might thus have received, where he is not charged with negligence or improper conduct.³³ All that is required of a mortgagee in possession of the property is such management as a prudent man would exercise over his own property,³⁴ and he is bound to the same diligence to make the property productive that such owner would use³⁵ and he must not permit or commit waste.³⁶

small sums and at remote intervals, which are never of so much value as when the whole amount is received at once.

"In *Gibson v. Crehore*, 22 Mass. (5 Pick.) 146, the court charged the mortgagee in possession with interest on the rents and profits; but that case was decided on its own circumstances, the court considering that the widow was precluded by the purchase of the mortgage from claiming her dower without filing a bill to redeem, and the court declined determining the general rule. But, in that case, it is to be observed that five per cent. commission was allowed on the rents and profits received by the assignee of the mortgage. There are peculiar circumstances in this case which would make it improper to charge interest on the rents received as the defendant was in possession under a purchase; and is only a constructive mortgagee in possession; but we prefer to rest the case on the general rule applicable to such cases, which is, that a mortgagee in possession is not chargeable with interest on the rents received as the estate, unless there be some circumstances connected with the transaction making it proper he should be so charged."

³³ *Benham v. Rowe*, 2 Cal. 387, 56 Am. Dec. 342.

³⁴ *Benham v. Rowe*, 2 Cal. 387, 56 Am. Dec. 342.

³⁵ *Shaeffer v. Chambers*, 6 N. J. Eq. (2 Halst.) 548, 47 Am. Dec. 211.

³⁶ *Schacffer v. Chambers*, 6 N. J. Eq. (2 Halst.) 548, 47 Am. Dec. 211; *Youle v. Richards*, 1 N. J. Eq. (1 Saxt.) 534, 23 Am. Dec. 722; *Kinkead v. Peet*, 182 N. W. 1095. (Iowa); *American Freehold Land Mortgage Co. v. Pollard*, 132 Ala. 155, 32 So. 630.

In the case of *Shaeffer v. Chambers*, 6 N. J. Eq. (2 Halst.) 547, 47 Am. Dec. 211, in discussing the question of diligence, the court say: "Is it sufficient for the mortgagee, thus in possession, in order to relieve himself from any charge for rents and profits for the years during which the premises were thus vacant, simply to say that he could not rent them; or should he be held to show proper diligence to procure a tenant? Is the mortgagor to prove that he might have rented it but for his wilful default, as that he turned out a sufficient tenant, or refused to receive a sufficient tenant, as would seem to be held in *Anonymous*, 1 Vern. 45; or does the fact of the premises being left

In those cases where the purchaser at a foreclosure sale removes a house he has put upon the property, without injury to the premises, before redemption is made, he cannot be compelled to account to the redemptioner for the rents and profits of such house.³⁷

It has been held in Massachusetts that the occupation of a house on mortgaged premises by a husband and wife, the latter being the mortgagee, under an agreement between the husband and the wife's mother, who is supposed to be the owner of part of the premises, is not such a "possession of the premises" by the mortgagee, within the meaning of the statute of that state,³⁸ as will entitle the mortgagor, on a bill in equity to redeem, to have the rent of the tenement applied towards the payment of the mortgage debt.³⁹

§ 1207. Costs on—Attorney's fees.—We have already seen⁴⁰ that as one of the terms or conditions of letting in the mortgagor to redeem, the court may require the payment of the costs of the suit. The general rule is that the mortgagor coming in to redeem must pay the costs of the foreclosure suit.⁴¹ But we have already seen that an allowance for attorney's fee, stipulated for in the mortgage, is not one of

vacant throw upon the mortgagee the burden of proving reasonable diligence to procure a tenant, as seems to be held in *Metcalf v. Champion*, 1 Moll. 238? It seems to me, that it will not do for the mortgagee, having thus taken possession, to fold his arms and use no means to procure a tenant; and I am disposed to think he ought to be held to show reasonable diligence to procure a tenant. But at all events, if the farm and buildings are not rented, he ought to cause the farm to be tilled, and that in a husband-like manner."

³⁷ *Poole v. Johnson*, 62 Iowa, 611,

17 N. W. 900. See *Spurgen v. Adamson*, 62 Iowa, 661, 18 N. W. 293.

³⁸ Mass. Gen. Stat. c. 140, § 15.

³⁹ *Sanford v. Pierce*, 126 Mass. 146.

⁴⁰ See *ante*, § 1184.

⁴¹ *Blum v. Mitchell*, 59 Ala. 535; *Whitcomb v. Harris*, 90 Me. 206, 38 Atl. 138. See *National Mutual Building & Loan Ass'n v. Houston*, 81 Miss. 386, 32 So. 911. See also *Lynch v. Ryan*, 137 Wis. 13, 129 Am. St. Rep. 1040, 118 N. W. 174. But see *Rodman v. Quick*, 211 Ill. 546, 71 N. E. 1087.

the items of costs that can be charged to the redemptioner;⁴² and where such a fee is paid, under protest, on redemption from a statutory foreclosure, it may be recovered back.⁴³ The reason for this is said to be because a stipulation in a mortgage, fixing in advance a gross allowance for the attorney's fee in the event of foreclosure at law, is against public policy and cannot be enforced.⁴⁴

⁴² See *ante*, § 1187.

⁴⁴ *Vosburgh v. Lay*, 45 Mich. 455.

⁴³ *Vosburgh v. Lay*, 45 Mich. 455, 8 N. W. 91.
8 N. W. 91.

CHAPTER XLIV.

REDEMPTION—CONTRIBUTION ON.

§ 1208. Contribution—Generally.

§ 1209. Same—Where mortgaged land is sold in parcels.

§ 1210. Same—By subsequent grantee.

§ 1211. Same—By widow.

§ 1212. Same—Redemption without, when.

§ 1208. Contribution—Generally.—By contribution is understood the share provided by or due from one or several persons to assist in discharging a common obligation, or in advancing a common enterprise.⁴⁵ In case of redemption from mortgage, either before or after foreclosure, contribution means the payment by each of two or more persons who are interested in the equity of redemption, to another person interested in the equity of redemption, who has redeemed the premises of his proportionate part of the money necessarily expended in effecting such redemption, and applies, alike, where the equities existing between the parties are equal⁴⁶ or unequal.⁴⁷ Hence, any person with an interest in land subject to a mortgage, is entitled to redeem from such mortgage and call upon other persons interested in the equity of redemption for contribution.⁴⁸

⁴⁵ Anderson's Law Dict. 251; II. Cent. Dic. & Cyc. 1236.

⁴⁶ *Chase v. Woodbury*, 60 Mass. (6 Cush) 143.

⁴⁷ *Young v. Williams*, 17 Conn. 393; *Kingsbury v. Buckner*, 70 Ill. 514; *Beal v. Barclay*, 10 B. Mon. (Ky.) 261; *Barley v. Myrick*, 50 Me. 171; *Aiken v. Gale*, 37 N. H. 501; *Stevens v. Cooper*, 1 John. Ch.

(N. Y.) 245, 7 Am. Dec. 499; *Cheescbrough v. Millard*, 1 John. Ch. (N. Y.) 409, 7 Am. Dec. 494; *Stroud v. Casey*, 27 Pa. St. 471; *Wheeler v. Willard*, 44 Vt. 640; *McLaughlin v. Curts*, 27 Wis. 644; *Herbert's Case*, 3 Co. 14; *Harris v. Ingleden*, 3 Pr. Wms. 98, 99.

⁴⁸ *Palk v. Clinton*, 12 Ves. 48, 8 Rev. Rep. 283. See *Lyons v. Rob-*

§ 1209. Same—Where mortgaged land is sold in parcels.—The general rule is that tracts of land sold by a mortgagor after the execution of the mortgage are liable for the mortgage debt in the inverse order of alienation,⁴⁹ and this is equally true whether the land as originally mortgaged, consisted of separate tracts of land,⁵⁰ or of a single tract broken up into lots and sold at various times, to different parties;⁵¹ the same is true where the mortgagor conveys the entire mortgaged tract to a grantee who afterwards recon-

inson, 45 Conn. 513; *Johnson v. Candage*, 31 Me. 28; *Ney v. Patterson*, 35 Mich. 413; *Jennings v. Jordan*, L. R. 6 App. Cas. 698, 51 L. J. Ch. 129, 5 L. T. 593.

⁴⁹ *Mobile Marine Dock & Mut. Ins. Co. v. Huder*, 35 Ala. 713; *Bank v. Dundas*, 10 Ala. 661; *Haskell v. State*, 31 Ark. 101; *Ritch v. Eichelberger*, 13 Fla. 169; *Sidener v. White*, 46 Ind. 595; *Kendall v. Hodgins*, 7 Abb. (N. Y.) Pr. 317, 1 Bosw. (N. Y.) 67; *Kellogg v. Rand*, 11 Paige Ch. (N. Y.) 59; *Skeel v. Spraker*, 8 Paige Ch. (N. Y.) 195; *Kiersted v. Avery*, 4 Paige Ch. (N. Y.) 13; *James v. Hubbard*, 1 Paige Ch. (N. Y.) 233; *Martin v. Wagener*, 1 T. & C. (N. Y.) 513; *Steere v. Steere*, 7 Week. Dig. (N. Y.) 433; *Reynolds v. Tooker*, 18 Wend. (N. Y.) 593.

⁵⁰ *Mobile Marine Dock & Mut. Ins. Co. v. Huder*, 35 Ala. 713; *Cummings v. Cummings*, 3 Ga. (3 Kelly) 460; *Wikoff v. Dows*, 4 N. J. Eq. (3 H. W. Gr.) 224; *Dutton v. Updike*, 3 N. J. Eq. (2 H. W. Gr.) 125; *Shannon and Marcillis*, 1 N. J. Eq. (1 Saxt.) 413; *Clowes v. Dickenson*, 5 John. Ch. (N. Y.) 235; *Kelly v. Rand*, 11 Paige Ch. (N. Y.) 59; *Schryver v. Teller*, 9 Paige Ch. (N. Y.) 173; *Keel v.*

Spraker, 8 Paige Ch. 181; *Guion v. Knapp*, 6 Paige Ch. (N. Y.) 35, 29 Am. Dec. 741; *Gouverneur v. Lynch*, 5 Paige Ch. (N. Y.) 300; *Commercial Bank v. Western Reserve Bank*, 11 Ohio. 444, 38 Am. Dec. 739; *Stoney v. Shultz*, 1 Hill (S. C.) Eq. 500, 27 Am. Dec. 429; *Conrad v. Harrison*, 3 Leigh (Va.) 532.

⁵¹ *Mobile Marine Dock & Mut. Ins. Co. v. Huder*, 35 Ala. 713; *Bank v. Dundas*, 10 Ala. 661; *Sanford v. Hill*, 46 Conn. 42; *Ritch v. Eichelberger*, 13 Fla. 169; *Cumming v. Cumming*, 3 Ga. (3 Kelly) 460; *Meacham v. Steele*, 93 Ill. 135; *Hahn v. Behrman*, 73 Ind. 120; *Windsor v. Evans*, 72 Iowa, 692, 34 N. W. 481; *Sheperd v. Adams*, 32 Me. 63; *Beard v. Fitzgerald*, 105 Mass. 134; *George v. Wood*, 91 Mass. (9 Allen) 80, 85 Am. Dec. 741; *Kilborn v. Robbin*, 90 Mass. (8 Allen) 466; *George v. Kent*, 89 Mass. (7 Allen) 16; *Bradley v. George*, 84 Mass. (2 Allen) 392; *Chase v. Woodbury*, 60 Mass. (6 Cush.) 143; *Allen v. Clark*, 34 Mass. (17 Pick.) 47; *Hall v. Edwards*, 43 Mich. 473, 5 N. W. 652; *Johnson v. Williams*, 14 Minn. 260; *Brown v. Simmons*, 44 N. H. 475; *Hiles v. Coult*, 30 N. J. Eq. (3 Stew.) 40; *Coles v. Appleby*, 87 N. Y. 114;

veys to different parties at different times the whole or a portion thereof.⁵²

The equity existing between the purchasers at different times from the mortgagor is one which the mortgagee must regard where he has either actual or constructive notice thereof⁵³ and he will not be permitted to in any way interfere with his equity by releasing a part of the mortgaged premises which, in equity, is primarily liable for the payment of his debt.⁵⁴

§ 1210. Same—By subsequent grantee.—The right of contribution from a subsequent grantee for a portion of the mortgaged premises cannot be settled in a suit in equity to redeem from the mortgagor, unless such grantee is made a party to the bill.⁵⁵

§ 1211. Same—By widow.—The wife must contribute ratably to a redemption of a mortgage already on the premises. Where the heir redeems and pays off a mortgage, and

Hopkins v. Wolley, 81 N. Y. 77; *Carpenter v. Cooms*, 20 Pa. St. 222; *Meng v. Houser*, 13 Rich. (S. C.) Eq. 210; *Miller v. Rogers*, 49 Tex. 398; *Root v. Collins*, 44 Vt. 173; *Jones v. Myrick*, 8 Gratt. (Va.) 179; *Aiken v. Milwaukee & St. P. R. Co.* 37 Wis. 469.

⁵² *Wikoff v. Dows*, 4 N. J. Eq. (3 H. W. Gr.) 224; *Guion v. Knapp*, 6 Paige Ch. (N. Y.) 35, 29 Am. Dec. 741.

An exception to this rule seems to prevail in Iowa (*Barney v. Myers*, 28 Iowa, 472) and Kentucky (*Poston v. Eubank*, 3 J. J. Marsh. (Ky.) 42), where it is held that the parcels of land must contribute ratably.

In other states it is held that where the conveyance is made by

the mortgagor without warranty, the grantors must contribute ratably. See *Erlinger v. Bul*, 7 Ill. App. 440; *Aiken v. Gale*, 37 N. H. 501; *Carpenter v. Cooms*, 20 Pa. St. 222.

⁵³ *George v. Wood*, 91 Mass. (9 Allen) 80, 85 Am. Dec. 741; *Parkman v. Welch*, 36 Mass. (19 Pick.) 231; *Brown v. Simmons*, 44 N. H. 475.

⁵⁴ *Jordan v. Hamilton County Bank*, 11 Neb. 499, 9 N. W. 654; *Hoyt v. Bramhall*, 19 N. J. Eq. (4 C. E. Gr.) 571, 97 Am. Dec. 687; *Stuyvesant v. Hall*, 2 Barb. (N. Y.) 156; *Guion v. Knapp*, 6 Paige Ch. (N. Y.) 35, 29 Am. Dec. 741.

⁵⁵ *Lamb v. Montague*, 112 Mass. 354; *George v. Wood*, 91 Mass. (9 Allen) 80, 85 Am. Dec. 741.

she files a bill against him for dower, she should contribute by paying, during her life, to the heir, one-third of the interest on the amount paid by him, to be computed by a master from the time of such payment.⁵⁶ But where that is inconvenient or embarrassing, the value of such annuity may be directed to be deducted from the amount, her age and health considered.⁵⁷ But in no manner is she to be charged more than the proportional part which she should be required to pay.⁵⁸ It is thought, however, that where the case presents no question between the widow and the owner of the equity of redemption, who has redeemed in fact, or who is to be regarded as having done so by equitable construction, no question of contribution arises for the reason that there has been no redemption. In those cases, however, where the equity of re-

⁵⁶ *Swaine v. Perine*, 5 John. Ch. (N. Y.) 482, 9 Am. Dec. 318. See *McMahon v. Russell*, 17 Fla. 705; *Gibson v. Crehore*, 22 Mass. (5 Pick.) 146; *Pollard v. Noyes*, 60 N. H. 185; *Norris v. Morrison*, 45 N. H. 494; *Woods v. Wallace*, 30 N. H. 384; *Hastings v. Stevens*, 29 N. H. 564; *Rossiter v. Cossit*, 15 N. H. 38; *Cass v. Martin*, 6 N. H. 25; *Denton v. Nanny*, 8 Barb. (N. Y.) 618; *Gunning v. Carman*, 3 Redf. (N. Y.) 71.

The widow having only a life interest in the dower, say the court in the case of *Swaine v. Perine*, 5 John. Ch. (N. Y.) 482, 9 Am. Dec. 318, payment of the entire one-third of the debt would be unjust. It would be making her pay for a life estate equally as if it was an estate in fee. The more accurate rule would appear to be, that she should "keep down one-third of the interest of the mortgage debt, by paying during her life, to the defendant, the interest of one-third

part of the aggregate amount of the principal and interest of the mortgage debt paid by the defendant, to be computed from the date of such payment."

"As it would be inconvenient and embarrassing to charge her with such an annuity, then let the value of such annuity from the plaintiff (her age and health considered) be ascertained by one of the masters of the court, and be deducted from the amount of the rents and profits so coming to her; and if that value should exceed the amount of the rents and profits so coming to her, that then, the residue of such value be deducted from the dower to be assigned to her, out of the house and land mentioned in the bill."

⁵⁷ *Swaine v. Perine*, 5 John. Ch. (N. Y.) 482, 9 Am. Dec. 318; *Gunning v. Carman*, 3 Redf. (N. Y.) 71.

⁵⁸ *Cox v. Garst*, 105 Ill. 347; *Swaine v. Perine*, 5 John. Ch. (N. Y.) 482, 9 Am. Dec. 318. See *Selb*

demption is exercised by a purchaser, the widow is entitled to dower only by contributing her portion of the mortgage debt.⁵⁹

§ 1212. Same—Redemption without, when.—It is said that where one takes a deed of warranty to a portion of a parcel of land, the whole of which is subject to a mortgage, he may maintain a bill in equity to redeem the same against a subsequent assignee of the mortgage, without contribution, in those cases where the remaining portion of the land is sufficient to satisfy the mortgage debt in full, although such assignee may also have become the owner of the equity of redemption of the remaining portion of the land.⁶⁰ In the case of *Bradley v. Nathan*,⁶¹ one Daniels, who was the owner of fifteen acres of land, mortgaged the same to Godfrey and Mayhew and afterwards conveyed six acres by deed of warranty to the plaintiff. Subsequently to both of these conveyances Daniels became insolvent and his right in equity to redeem the remaining nine acres was conveyed by his assignees in insolvency to one Nathaniel Cheeseman, who mortgaged the same to the defendant. The defendant then procured an assignment to himself of the original mortgage to Godfrey and Mayhew and entered to foreclose it for breach of condition. The plaintiff asked in his bill that the defendant release to him the parcel of about six acres which he held under the deed of warranty from Daniels without contribution by

v *Montague*, 102 Ill. 446; *Hearsthorne v. Heartsthorne*, 2 N. J. Eq. (1 H. W. Gr.) 349; *Russel v. Austin*, 1 Paige Ch. (N. Y.) 102.

⁵⁹ *Trowbridge v. Sypher*, 55 Iowa 352, 7 N. W. 567; *Bank of Commerce v. Owens*, 31 Md. 327, 1 Am. Rep. 64; *Van Vronkman v. Eastman*, 48 Mass. (7 Met.) 157; *Swaine v. Perine*, 5 John. Ch. (N. Y.) 482, 9 Am. Dec. 318; *Danforth v. Smith*, 23 Vt. 247.

⁶⁰ *Bradley v. Nathan*, 84 Mass. (2 Allen) 392; *Chase v. Woodbury*, 60 Mass. (6 Cush.) 143. See *Dooley v. Potter*, 140 Mass. 49, 59; *Beard v. Fitzgerald*, 105 Mass. 134; *George v. Wood*, 91 Mass. (9 Allen) 80, 85 Am. Dec. 741; *Kilborn v. Robbins*, 90 Mass. (8 Allen) 466, 470.

⁶¹ 84 Mass. (2 Allen) 392.

him toward the first mortgage. It was admitted that the value of the nine acres was fully sufficient to satisfy the first mortgage without contribution and the court held, on the authority of *Chase v. Woodbury*,⁶² that the plaintiff was entitled to the decree prayed for in the bill.

⁶² 60 Mass. (6 Cush.) 143.

CHAPTER XLV.

REDEMPTION—ACTION TO REDEEM.

- § 1213. Bill to redeem—Introductory.
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- § 1241. Same—Accounting for value.
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- § 1243. Costs on redemption.

§ 1213. Bill to redeem.—Introductory.—In those states in which the distinction between law and equity is still maintained, and in the code states, the remedy for enforcing the

right of redemption is an equitable one, and governed by equitable rules.⁶³ Where an action to redeem from a mortgage is statutory, it is an action of a nature sufficiently equitable to bring the plaintiff within the rule that he who seeks equity must do equity.⁶⁴ Thus, the amount of the judgment against the mortgagor, which was a lien on the land in favor of the mortgagee at the time of the purchase, must be paid, as well as the mortgage debt and the advances.⁶⁵

§ 1214. **Same—Accounting for rents and profits.**—The general rule is that a personal judgment may be given in an action to redeem from a sale under the power in a mortgage, and for an accounting of the rents and profits, although not prayed for in the pleadings.⁶⁶

⁶³ See *Woods v. Woods*, 66 Me. 206; *Pearce v. Savage*, 45 Me. 90; *Parsons v. Welles*, 17 Mass. 419; *Hill v. Payson*, 3 Mass. 559; *Craft v. Bullard*, 1 Smeed & M. Ch. (Miss.) 366; *Jackson v. Cunningham*, 28 Mo. App. 354; *Pell v. Ulmar*, 18 N. Y. 139; *Douglas v. Woodworth*, 51 Barb. (N. Y.) 79.

⁶⁴ *Shaw v. Abbott*, 61 N. H. 254; *Hinton v. Pritchard*, 107 N. C. 128, 12 S. E. 242, 10 L.R.A. 401; *Evans v. Pike*, 118 U. S. 241, 30 L. ed. 234, 6 Sup. Ct. Rep. 1090.

In *Louisiana*, one having an interest in mortgaged land who was not made a party to a foreclosure cannot dispossess the purchaser without offering to redeem; and his remedy, in a federal court, is by bill in equity to redeem, not by an action at law for the possession. *Evans v. Pike*, 118 U. S. 241, 30 L. ed. 234, 6 Sup. Ct. Rep. 1090.

⁶⁵ *Hinton v. Pritchard*, 107 N. C. 128, 10 L.R.A. 401, 12 S. E. 242.

⁶⁶ *Johnson v. Loftin* (N. C.) 16 S. E. 179, 111 N. C. 319. See *Par-*

mer v. Parmer, 74 Ala. 285; *Ware v. Crotty*, 66 Ill. 197; *Dinsmore v. Savage*, 68 Me. 191; *Parker v. Child*, 25 N. J. Eq. (10 C. E. Gr.) 41.

In *Alabama*, a mortgagor is entitled to all rents and profits accruing after tender of redemption. *Parmer v. Parmer*, 74 Ala. 285.

In *Maine*, where a party conveyed land with a covenant against incumbrances, and took a mortgage to secure a part of the purchase money, on a bill to redeem, the court held that he was not chargeable for use and occupation by a third party holding possession without right and without his consent. *Dinsmore v. Savage*, 68 Me. 191.

In *New Jersey*, a first mortgagee purchasing, if the property is redeemed, must account for the rents and profits during his occupation of the premises, and cancel any mortgage given, by himself thereon, after he had received his deed. *Parker v. Child*, 25 N. J. Eq. (10 C. E. Gr.) 41.

Hence on a bill to redeem from a mortgage, where the mortgagee has been in possession, the latter will be charged with the rents actually received, and what could have been received by reasonable care and diligence.⁶⁷ But the mort-

⁶⁷ *Harper v. Ely*, 70 Ill. 581. See *Blum v. Mitchell*, 59 Ala. 535; *Powell v. Williams*, 14 Ala. 476, 48 Am. Dec. 105; *Equitable Trust Co. v. Fisher*, 106 Ill. 189; *Rooney v. Crary*, 11 Ill. App. 213; *Crossman v. Card*, 143 Mass. 152, 9 N. E. 514, *Gerrish v. Black*, 104 Mass. 400; *Shouler v. Bonander*, 80 Mich. 531, 45 N. W. 487; *Millard v. Truax*, 73 Mich. 381, 41 N. W. 328; *Posten v. Miller*, 60 Wis. 494, 19 N. W. 540. Compare, *Hall v. Westcott*, 17 R. I. 504, 23 Atl. 25. See *ante*, § 1206.

Equity has jurisdiction of a suit by a mortgagor against a mortgagee in possession to redeem, and for an account of rents and profits. *Posten v. Miller*, 60 Wis. 494, 19 N. W. 540.

In a suit to redeem against a mortgagee in possession brought by the mortgagor's grantee and assignee of the lands, the latter is entitled to an accounting and to have any balance above expenses applied on the mortgage. *Shouler v. Bonander*, 80 Mich. 531, 45 N. W. 487.

The mortgagor may show the actual amount of rents and profits obtained by the mortgagee while in possession. *Rooney v. Crary*, 11 Ill. App. 213.

But it is proper, on a bill to redeem for the master to disallow a mortgagee's account made up from memory only after the lapse of several years, and to make a computation himself based upon the

evidence. *Hall v. Westcott*, 17 R. I. 504, 23 Atl. 25.

The mortgagee is chargeable with the actual rents and profits received by him from the time he entered into possession, and is to be credited with annual taxes paid by him. The balance remaining each year should be applied first to the extinguishment of the interest on the mortgage debt, and the remainder, if any, to the principal. *Blum v. Mitchell*, 59 Ala. 535.

In *Gerrish v. Black*, 104 Mass. 400, on a bill in equity to redeem lands from a mortgage, it appeared that the defendant, who had entered to foreclose, lived in another state, and appointed an agent to manage the property; and there was no evidence of negligence in the appointment of the agent, or of fraud on the part of the mortgagee. The court held that without other evidence of negligence than the testimony of the mortgagor's witnesses, as experts, that a higher rent could have been obtained, the mortgagee should not be charged with a greater amount than he received as rent.

A mortgagee refusing to allow redemption and ejecting the mortgagor from possession, must account not only for the rents, but for the damages and costs recovered in the ejectment suit, and for what the mortgagor would have realized from the crop growing on the premises at the time of the

gagagee should be charged with the rent of the land only from the time he was let into the occupancy of the premises, and interest must not be charged upon the rents from the end of the year when they accrued, but the rents should be first applied at the end of the year to extinguish the interest for that year; and if a balance of rent remains it should be applied *pro tanto* to the payment of the principal.⁶⁸ Where an action is brought to redeem property that is open, unenclosed, and without buildings, and the mortgagee's possession was merely constructive, he should not be charged anything for its use and occupation.⁶⁹ And where there have been needed improvements which facilitate the enjoyment of the estate or enhance the value they may be set off against rents and profits;⁷⁰ and the mortgagee should be allowed for taxes paid by him, if he is required to pay rent for his occupancy.⁷¹

But an account of rents and profits is not an inseparable incident to a decree for redemption against a mortgagee in

ouster, less the probable cost of cultivation, etc. *Powell v. Williams*, 14 Ala. 476, 48 Am. Dec. 105.

In *New Jersey* an assignee of a mortgage given as further security for a debt which had been previously secured by a lease by the mortgagee of the premises as collateral cannot be charged by the mortgagor, on a bill to redeem, with the rents collected by the mortgagee before the assignment, but never paid over to the assignee, who was merely to apply them on the debt at the end of the term of the lease. *Hall v. Westcott*, 17 R. I. 504, 23 Atl. 25.

Interest on.—In a suit in equity to redeem certain parcels of land from several mortgages given to the defendant's testator, on an accounting by the master under an order of the court, defendant ought to be charged with interest on items of credit to which plaintiff was found
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entitled by the master who stated the account between the parties. *Crossman v. Card*, 143 Mass. 152, 9 N. E. 514.

⁶⁸ *Powell v. Williams*, 14 Ala. 476, 48 Am. Dec. 105.

⁶⁹ *Peugh v. Davis*, 113 U. S. 542, 28 L. ed. 1127.

⁷⁰ But he will not be allowed to receive pay for his alleged improvements in cutting away timber. *Equitable Trust Co. v. Fisher*, 106 Ill. 189. See *Parmer v. Parmer*, 74 Ala. 285; *Equitable Trust Co. v. Fisher*, 106 Ill. 189; *Millard v. Truax*, 73 Mich. 381, 41 N. W. 328.

Any excess over the improvements cannot be recovered of the mortgagee while in possession under foreclosure sale. *Parmer v. Parmer*, 74 Ala. 285.

⁷¹ *Millard v. Truax*, 73 Mich. 381, 41 N. W. 328.

possession,⁷² and when allowed, a sum equal to the interest on the money borrowed should not in such case be allowed as rent, where the possession was worth nothing.⁷³ In those cases where there has been long delay, and acquiescence in the claim of the mortgagee to ownership, it is said that the account of interest due on the loan, and of the rent and profits of the land commence at the date of the filing of the bill.⁷⁴

§ 1215. **Same—Dismissal of—Effect.**—A bill to redeem, like any other bill in equity, will be dismissed for want of jurisdiction,⁷⁵ and in some cases where brought without leave and without authority and unsworn to, as required by the rules of practice,⁷⁶ will be dismissed. Thus it has been said that where a bill in equity brought to redeem mortgaged premises on the day before a foreclosure would have become absolute, is made returnable in the wrong county, and dismissed for want of jurisdiction, and no tender has been made of the amount due, and there has been no contract to extend the time of redemption, a bill to redeem, brought nearly a year after the dismissal of the former bill, should be dismissed.⁷⁷ The effect of a simple dismissal of a bill to redeem,⁷⁸ or failure to perform the decree,⁷⁹ is an immediate and absolute foreclo-

⁷² *Russell v. Southard*, 53 U. S. (12 How.) 139, 13 L. ed. 927.

In order to recover in separate action, from a purchaser in possession, for rents and profits, the mortgagor must show that he was prevented by accident, fraud, or mistake from considering them when he made his offer to redeem. *Barret v. Blackmar*, 47 Iowa, 565.

⁷³ *Peugh v. Davis*, 113 U. S. 542, 28 L. ed. 1127.

⁷⁴ *Russell v. Southard*, 53 U. S. (12 How.) 139, 13 L. ed. 927.

⁷⁵ See *post*, §§ 1213, 1218.

⁷⁶ See *Sanford v. Haines*, 71 Mich. 116, 38 N. W. 777.

⁷⁷ *Webb v. Nightingale*, 96 Mass. (14 Allen) 374.

See *Bancroft v. Sawin*, 143 Mass. 144.

Delay is ground for dismissal of bill. Thus where a plaintiff filed a bill in equity to redeem from a mortgage, and did nothing further for two years, the court held that, in its discretion, it might dismiss the bill, and that the fact of its being a bill to redeem did not affect the case. *Bancroft v. Sawin*, 143 Mass. 144.

⁷⁸ *Goodenow v. Curtis*, 33 Mich. 505.

⁷⁹ It is error to direct a dismissal

sure,⁸⁰ and the adjudication by a referee, that the mortgage shall be forever foreclosed, upon the neglect of the mortgagor to redeem at the time specified in his award, is unobjectionable, as it only declares what would be the legal effect of his award, if it were silent upon the question of foreclosure.⁸¹ The usual form of a decree letting in a party to redeem is that in case of default made in the payment of the sum decreed to be paid within the time allowed, that the bill be dismissed.⁸²

§ 1216. Same—Evidence on.—In those jurisdictions where the mortgagor and mortgagee may legally agree that the mortgage shall stand as security for a debt other than that described in the mortgage, on a bill to redeem, the mortgagee may show by oral testimony what was the real debt or obligation which the mortgage was given to secure, or that after it was given, the parties agreed that it should be held as security for a new and different debt.⁸³

In those cases where there has been a conditional sale and a conveyance absolute on its face, and plaintiff seeks to redeem therefrom, the burden of proof is upon him to show that his

of a bill to redeem if the plaintiff fail to pay within three months. In default of payment, a sale with the usual statutory right of redemption should have been ordered. *Hollingsworth v. Koon*, 117 Ill. 511, 6 N. E. 148, 8 Id. 193.

⁸⁰ *Hollingsworth v. Koon*, 117 Ill. 511, 6 N. E. 148, 8 Id. 193; *Beach v. Cooke*, 28 N. Y. 535, 86 Am. Dec. 260. See *Kolle v. Clausheidt*, 99 Ind. 100; *Shannon v. Speers*, 2 A. K. Marsh. (Ky.) 311; *Pitman v. Thornton*, 66 Me. 469; *Stevens v. Miner*, 110 Mass. 57. 59; *Gerrish v. Black*, 109 Mass. 474; *Borromscale v. Tuttle*, 22 Mass. (5 Pick.) 377; *Goodenow v. Curtis*, 33 Mich. 505; *Brown v. Simmons*, 45 N. H. 211; *Bolles v. Duff*, 43 N. Y. 474,

10 Abb. (N. Y.) Pr. N. S. 414, 41 How. (N. Y.) Pr. 359; *Sherwood v. Hooker*, 1 Barb. Ch. (N. Y.) 650; *Quinn v. Brittain*, 1 Hoffm. Ch. (N. Y.) 353; *Perine v. Dunn*, 4 John. Ch. (N. Y.) 140; *Waller v. Harris*, 7 Paige Ch. (N. Y.) 167; *Jenkins v. Elridge*, 1 Woodb. & M. C. C. 61; *Wood v. Surr*, 19 Beav. 551; *Hansard v. Hardy*, 18 Ves. 460; *Winchester v. Paine*, 11 Ves. 199, 8 Rev. Rep. 131.

⁸¹ *Pitman v. Thornton*, 66 Me. 469.

⁸² *Cowing v. Rogers*, 34 Cal. 655; *Shannon v. Speers*, 2 A. K. Marsh. (Ky.) 698; *Perine v. Dunn*, 4 John. Ch. (N. Y.) 140.

⁸³ *Taft v. Stoddard*, 141 Mass. 150, 6 N. E. 836.

offer to redeem was made within the time provided by the conditions under which the conveyance was made.⁸⁴ Where the bill was not brought for six years after the foreclosure, evidence cannot be received impeaching the authority of an attorney to enter, in the foreclosure suit, the appearance of a purchaser under an execution sale made subject to the mortgage more than a year before the foreclosure suit, such purchaser being aware of the foreclosure, and selling his certificate of purchase to the complainant without taking any steps to redeem, and the premises meanwhile being occupied by several successive grantees under the foreclosure title.⁸⁵

In a case where a first mortgagee, after obtaining a decree of foreclosure, but without a sale thereunder, went into possession of the mortgaged premises under a quit claim deed from the mortgagee's vendee. A second mortgagee, who had foreclosed and obtained the usual deed, filed a bill to redeem. The court held that the facts established a *prima facie* case for the complainants, and threw upon the defendant the burden of proving a paramount title.⁸⁶

It is thought that where suit is brought against both the mortgagor and the mortgagee by one claiming to be the assignee of the mortgagor, for the purpose of setting up the assignment and redeeming, it is necessary to prove that the assignment was for a valuable consideration. But if the suit is against the mortgagor alone it is sufficient to prove the assignment without proving any consideration.⁸⁷

§ 1217. Same—Irregularities waived by.—Filing a bill to redeem from a foreclosure sale is a waiver of any objections the redemptioner might otherwise make to the regularity and sufficiency of the sale. Thus it has been said that a bill by a mortgagor to redeem, treating the sale as valid, is a

⁸⁴ *Bridges v. Linder*, 60 Iowa, 190, 14 N. W. 217.

⁸⁵ *Kenyon v. Shreck*, 52 Ill. 382.

⁸⁶ *Farmers' &c. Bank v. Bronson*, 14 Mich. 361.

⁸⁷ *Medley v. Mask*, 4 Ired. (N. C.) Eq. 339.

waiver of irregularities in that the land was sold at a different place from that named in the deed, and without the appraisement required by law.⁸⁸ In those cases where a decree of foreclosure is interposed, by the party obtaining it, as an objection to a redemption, which, but for the effect of the decree, would be just and reasonable, its irregularity, as well as any other circumstance for which it ought to be set aside or modified, will be considered on the question whether the time for redemption shall be further extended. And the validity of the decree, in such case, is gone into, not as a technical question of evidence but as being of itself a ground of relief to the party seeking to redeem.⁸⁹

§ 1218. **Same—Jurisdiction.**—Jurisdiction to redeem from a mortgage either before or after sale, is a matter of local statute or rules of practice. But the general rule is that a bill to redeem lands from a sale under a mortgage should be filed in the county where jurisdiction *in personam* can be obtained over the mortgagee, without reference to the *situs* of the land.⁹⁰

It has been said that the New Jersey statute authorizing courts of law to enforce equities of redemption, in certain cases, by compelling the mortgagee to reconvey the mortgaged premises, upon payment into court of the money secured

⁸⁸ *Dailey v. Abbott*, 40 Ark. 275.

⁸⁹ *Bridgeport Sav. Bank v. Eldredge*, 28 Conn. 556, 73 Am. Dec. 688. See *Littell v. Zuntz*, 2 Ala. 256, 36 Am. Dec. 415; *Seymour v. Davis*, 35 Conn. 271; *Millspaugh v. McBride*, 7 Paige Ch. (N. Y.) 509, 34 Am. Dec. 360.

A regularly enrolled decree cannot be altered, as a general rule, except by bill in review. *Lillie v. Shaw*, 59 Ill. 76.

Decree by default may be opened, it is thought, to let in a defense on the merits of which a party has

been deprived by the negligence of his counsel. *Thompson v. Golding*, 87 Mass. (5 Allen.) 82; *Nash v. Wetmore*, 33 Barb. (N. Y.) 159; *Curtis v. Ballagh*, 4 Edw. Ch. (N. Y.) 639; *Tripp v. Vincent*, 8 Paige Ch. (N. Y.) 180; *Millspaugh v. McBride*, 9 Paige Ch. (N. Y.) 509, 34 Am. Dec. 360.

⁹⁰ *Kanawha Coal Co. v. Kanawha, &c. Coal Co.* 7 Blatchf. C. C. 391, 415. See *Smith v. Larrabe*, 58 Me. 361. See also *Clark, as adm'r, etc. v. Seagraves, as adm'r, etc.* 186 Mass. 430, 71 N. E. 813.

by the mortgage, is not applicable to any case in which the mortgagor is himself the actor.⁹¹

The supreme court of Michigan, in the case of *Sanford v. Haines*,⁹² say that a decree of foreclosure for fifty dollars more than the amount due, does not, as a separate grievance, give a court of equity jurisdiction to let in to redeem the mortgagor or those claiming under him.

§ 1219. **Same—Multifariousness.**—A bill to redeem from a mortgage may be bad for multifariousness. But a bill by a mortgagor to avoid a sale under the power in the mortgage and to redeem, seeking relief in the alternative under a special agreement between himself and the mortgagee, or as a legal right from their relations, is not multifarious.⁹³ And in a case where a bill in equity was filed to redeem a mortgage and to secure a balance of account claimed to be due the complainant, it was held by the supreme court of Rhode Island not to be multifarious.⁹⁴ A complainant may claim the same thing under different titles in the same bill, and the statement of those titles will not render the bill multifarious.^{94a}

§ 1220. **Same—Requisites of—Tender.**—The general rule is that the bill to redeem must offer to pay the amount found to be due;⁹⁵ but such tender is not indispensable to the

⁹¹ *Shields v. Lozear*, 34 N. J. L. (5 Vr.) 496, 3 Am. Rep. 256.

⁹² 71 Mich. 116, 38 N. W. 777.

⁹³ *Adams v. Sayre*, 70 Ala. 318.

⁹⁴ *Greene v. Harris*, 10 R. I. 382.

^{94a} *Arnold v. Arnold*, 9 R. I. 397.

⁹⁵ *Kennebec & P. R. Co. v. Portland & K. Co.* 54 Me. 173; *Loney v. Courtney*, 24 Neb. 580, 39 N. W. 616; *Kemp v. Mitchell*, 36 Ind. 249; *McLelland v. A. P. Cook Co.* 94 Mich. 528, 54 N. W. 298.

See *Fouche v. Swain*, 80 Ala. 151; *Adams v. Sayre*, 70 Ala. 318; *Leh-*

man v. Collins, 69 Ala. 127; *Stocks v. Youngs*, 67 Ala. 341; *Draughdrill v. Sweeney*, 41 Ala. 310; *Crews v. Treadgill*, 35 Ala. 334; *Holt v. Rees*, 46 Ill. 181; *Nesbit v. Hanway*, 87 Ind. 400; *Kemp v. Mitchell*, 36 Ind. 249; *Anson v. Anson*, 20 Iowa, 55, 89 Am. Dec. 514; *Mealer v. Howes* (Me.) 10 Atl. 460; *Pitman v. Thornton*, 66 Me. 469; *Way v. Mullett*, 149 Mass. 49; *Gerrish v. Black*, 122 Mass. 76; *McLelland v. A. P. Cook Co.* 94 Mich.

right to maintain the bill.⁹⁶ Such a bill should distinctly and

528, 54 N. W. 298; *Dayton v. Dayton*, 68 Mich. 437, 30 N. W. 209; *Sardeson v. Menage*, 41 Minn. 314, 43 N. W. 66; *Hoopes v. Bailey*, 28 Miss. 328; *Edgerton v. McRea*, 6 Miss. (5 How.) 183; *Loney v. Courtney*, 24 Neb. 580, 39 N. W. 616; *Eastman v. Thayer*, 60 N. H. 408; *Perry v. Carr*, 41 N. H. 371; *Champion v. Joslyn*, 44 N. Y. 653; *Silsbee v. Smith*, 41 How. Pr. (N. Y.) 418; *Beekman v. Frost*, 18 John. Ch. (N. Y.) 544, 9 Am. Dec. 246; *Barton v. May*, 3 Sandf. Ch. (N. Y.) 450; *Still v. Buzzell*, 60 Vt. 478, 12 Atl. 209; *Kopper v. Dyer*, 59 Vt. 477, 59 Am. Rep. 742, 9 Atl. 4; *Brobst v. Brock*, 77 U. S. (10 Wall.) 519, sub nom. *Doe ex d. Brobst v. Roe*, 19 L. ed. 1002; *Dalter v. Hayter*, 7 Beav. 319; *Tasker v. Small*, 3 Myl. & C. 63; *Harding v. Pingey*, 10 Jur. N. S. 872. See ante § 1177; *Doe v. Littlefield, as adm'r, etc.* 99 Me. 317, 59 Atl. 438; *Shank v. Groff*, 45 W. Va. 543, 32 S. E. 248; *Lumsden v. Manson*, 96 Me. 357, 52 Atl. 783; *American Loan and Trust Co. v. Atlanta Electric Ry. Co.* 99 Fed. 313; See *Baker v. Burdeshaw*, 132 Ala. 166, 31 So. 497; *Sharpe v. Lees*, 123 Pac. 1071 (Or.) See also *Tucker v. Witherbee*, 130 Ky. 269, 113 S. W. 123; *Eldredge v. Hoefer*, 52 Or. 241, 93 Pac. 246; *Iowa Loan & Trust Co. v. Kunsch*, 135 N. W. 426 (Iowa).

In *Alabama*, tender is made a condition precedent by statute. (Code 1896, § 3507). *Lacey v. Lacey*, 39 So. 922 (Ala.) See also *Seals v. Rogers*, 55 So. 417 (Ala.)

A bill in equity to redeem, is not

good unless it contains a formal offer to pay whatever sum may be found due upon taking the account. *Kemp v. Mitchell*, 36 Ind. 249.

Same—The supreme court of Nebraska, in the case of *Loney v. Courtney*, 24 Neb. 580, 39 N. W. 616, say that in an action in equity to redeem from an alleged voidable mortgage foreclosure, the mortgagor must offer to pay what is equitably due under the decree, with interest and taxes.

A bill to set aside a mortgage foreclosure and for a discharge of the mortgage lien on a claim that a tender was made of the amount due, is not maintainable where there is no evidence that an unconditional tender of the amount due was made, and all the surrounding circumstances, as well as defendant's testimony, contradict the claim. *McClelland v. A. P. Cook Co.* 94 Mich. 528, 54 N. W. 298.

⁹⁶ *Beach v. Cooke*, 28 N. Y. 508, 86 Am. Dec. 260. See *Dennis v. Tomlinson*, 49 Ark. 568; *Decker v. Patton*, 120 Ill. 464, 11 N. E. 897, aff'g 20 Ill. App. 210; *Catterlin v. Armstrong*, 79 Ind. 548, 41 Am. Rep. 627; *Millett v. Blake*, 81 Me. 531, 10 Am. St. 275; *Brown v. So. Boston Sav. Bank*, 148 Mass. 300; *Kline v. Vogel*, 90 Me. 239, 2 S. W. 408; *Watkins v. Watkins*, 57 N. H. 462; *Hall v. Hall*, 46 N. H. 240; *Polk v. Mitchell*, 85 Tenn. 634; *Doty v. Norton*, 133 App. Div. 106, 117 N. Y. Supp. 793; *Longino v. Ball-Warren Commission Co.* 84 Ark. 521, 106 S. W. 682. See also *Toole, as rec'r, etc. v. Weirick*, 39 Mont. 359, 133 Am. St. Rep. 576, 102 Pac.

unequivocally set out the facts.⁹⁷ Thus in a bill to redeem and for a general accounting, a general averment that the balance due, if any, was inconsiderable, and that the purchasers at a sale under the mortgage bought with knowledge of the true state of the account, is too indefinite;⁹⁸ yet a bill to redeem may properly be framed with a double aspect, so that the complainant may avail himself of a tender if his proof

590; *Nichols v. Marquess*, 141 Ky. 642, 133 S. W. 562.

In *Arkansas*, where plaintiff has paid the mortgage, or the mortgagee has paid himself out of rents and profits, it is sufficient to offer payment and demand an accounting. *Dennis v. Tomlinson*, 49 Ark. 568.

In *Illinois* an offer to redeem is neither necessary nor material, in a bill for redemption. *Decker v. Patton*, 20 Ill. App. 210, aff'd in 120 Ill. 464, 11 N. E. 897; *Taylor v. Dillenberg*, 168 Ill. 235, 48 N. E. 41.

In *Indiana* the rule is same as in *Arkansas*. *Catterlin v. Armstrong*, 79 Ind. 514. See *Ætna Life Insurance Co. v. Stryker*, 38 Ind. App. 312, 78 N. E. 245.

In *Missouri*, in an equitable action to redeem, on payment of the balance found to be due, it is unnecessary that a tender of the money should be made in the petition, or that the money be paid into court. *Kline v. Vogel*, 90 Mo. 239, 2 S. W. 408. See *Gopling v. Walton*, 138 Mo. 485, 40 S. W. 99.

In *New Hampshire*, even without a tender or demand of account, a bill to redeem a mortgage can be maintained, as the special provisions of the statute allowing remedy by petition do not super-

sede the general remedy in equity. *Hall v. Hall*, 46 N. H. 240.

Thus it is said that a bill to redeem a mortgage, which goes upon the ground that the defendant fraudulently prevented the plaintiff from reasonably redeeming, and neglected to render, when requested, a statement of the sum due, should not be dismissed because there has not been a tender of the amount due, which payment can be provided for by the decree. *Watkins v. Watkins*, 57 N. H. 462.

In *Tennessee* a redemption bill is not defective because the redemption money is not brought into court; certainly not, where there has been a tender, where plaintiff offers to pay, where the bill has not been demurred to, and where defendant absolutely denies plaintiff's right to redeem. *Polk v. Mitchell*, 85 Tenn. 634.

⁹⁷ A bill in equity against a railroad corporation in possession to redeem the railroad from a mortgage, must allege that the defendant corporation has some title in the mortgage, or must aver information and belief of the same. It must also allege a formal offer to pay what may be found due. *Kennebec, &c. R. R. Co. v. Portland, &c. R. R. Co.* 54 Maine, 173.

⁹⁸ *Conner v. Smith*, 74 Ala. 115.

thereof shall be sufficient, or, failing in that, pray an account and to be permitted to pay the amount found due. Regularly, however, the prayer should be in the alternative.⁹⁹ In some states a bill to redeem must show affirmatively that the party claiming the equity of redemption was not made a defendant in the action for foreclosure,¹ and in others the bill to redeem must distinctly allege the debtor's delivery of possession to the purchaser within a stipulated time.² Upon a bill to redeem, where there are no peculiar facts and circumstances taking the case out of the ordinary rule, the complainant cannot claim as a right to have a decree entered for the sale of the mortgaged premises, as in case of foreclosure subject to the statutory right of redemption.³

§ 1221. **Same—Same—In action by grantee.**—It is thought that on a bill brought by the grantee of the mortgagor, the offer to redeem is sufficient in praying that the plaintiff be allowed to pay such sum as shall be found due on the mortgage;⁴ it is not necessary that he should offer to pay in such distinct terms as to constitute, if accepted, an enforceable contract.⁵ An amendment to a bill by such grantor or purchaser of the equity of redemption, admitting the equity to be in the mortgagor, and seeking redemption as a mere judgment creditor, is inadmissible, because radically changing the right of action.⁶

§ 1222. **Same—Same—In action by junior lienor.**—A bill to redeem, filed by a junior against a senior mortgagee, is a recognition of the validity of the older mortgage, and,

⁹⁹ *Gooding v. Riley*, 50 N. H. 400.

¹ *Dervin v. Jennings*, 4 Neb. 97.

² *Stocks v. Young*, 67 Ala. 341.

³ *Decker v. Patton*, 20 Ill. App. 210, aff'd 120 Ill. 464, 11 N. E. 897.

⁴ See *Murphree v. Summerlin*, 114 Ala. 54, 21 So. 470

⁵ *Brown v. South Boston Sav. Bank*, 148 Mass. 300.

Mass. Pub. Stats. c. 181, §§ 27, 33, are construed by the court in the above case, in arriving at the conclusion set out in the text.

⁶ *Rapier v. Gulf City Paper Co.* 69 Ala. 476.

in some jurisdictions, the redemptioner must offer to pay the amount due on it.⁷ In a case where one who files a bill to redeem from a mortgage avers that he owns a certain mortgage which is subsequent to his own, and his bill is not demurred to, it may be sustained notwithstanding he fails to set forth such facts as show that his mortgage and that from which he seeks to redeem are mortgages in the same chain of title. Especially is this true when it appears that the defendant has recognized his right to make payments by receiving interest from him.⁸ But where, in an action by a junior mortgagee to redeem mort-

gaged premises from a sale thereof, under a decree of foreclosure of the equity of redemption on a prior mortgage, it appeared that the plaintiff was not a party to the decree, and that he held an unrecorded mortgage at the commencement of the foreclosure suit, and the complaint did not aver that either the holder of the senior mortgage or the purchaser had notice of the unrecorded mortgage, the court held the complaint bad on demurrer.⁹

§ 1223. Same—Statutory provisions.—In most of the states, if not all of them, there are statutory provisions regulating actions to redeem. These statutes must be strictly complied with.¹⁰ Thus, under a statute¹¹ requiring a party redeeming to file within twenty-four hours the documents produced to the person or officer from whom the redemption is made, being intended for the benefit of subsequent redemptioners, they alone, if anyone, can take advantage of an omission to comply with its provisions.¹² Under the Missouri statute,¹³

⁷ *Fouche v. Swain*, 80 Ala. 151; *Higman v. Humes*, 133 Ala. 617, 32 So. 574.

⁸ *Lamb v. Jeffrey*, 47 Mich. 28, 10 N. W. 65.

⁹ *Harlock v. Barnhizer*, 30 Ind. 370.

¹⁰ *Doe v. Littlefield, as adm'r, etc.*

99 Me. 317, 59 Atl. 438. See *Iowa Loan & Trust Co. v. Kunsch*, 135 N. W. 426 (Iowa).

¹¹ Minn. L. 1881, Ex. Sess. c. 3.

¹² *Wilson v. Hayes*, 40 Minn. 531, 4 L.R.A. 196, 12 Am. St. 754, 40 Alb. L. J. 8, 42 N. W. 467.

¹³ Mo. Rev. Stat. §§ 3298, 3299

the right to redeem from a sale under a trust deed exists only when the *cestui que trust*, his assignee, or some one for one of them, becomes purchaser; and no party can redeem until he shall have given security at the date of sale.¹⁴

§ 1224. **Same—Time within which to be brought.**—The time within which a bill is to be brought is regulated by the local statutes or rules of the particular court in which the action is brought. Laches, and the running of the statute of limitation,¹⁵ among other things, bars the bringing of a bill to redeem. All possible indulgence is to be accorded to persons seeking to redeem, who have acted in good faith throughout. Thus, it has been said that a court of chancery, when it ascertains that the object of a deed absolute in form is to give security for a debt, will relieve the mortgagor from the consequences of his failure to redeem in time,¹⁶ although the parties intended time to be of the essence of the contract.¹⁷ And, on the other hand, in a case where the creditor assented to the extension of the time of payment of a debt secured by mortgage, but no definite time was fixed, and suit was not brought to foreclose the mortgage for nearly three and a half years, and the debtor, long before suit, intimated that, on a designated contingency which had occurred, he would not re-

¹⁴ *Dawson v. Egger*, 97 Mo. 36, 11 S. W. 61; *Updike v. Merchants' Elevator Co.* 96 Mo. 160, 8 S. W. 779. See *Walmsley v. Dougherty*, 163 Mo. 298, 63 S. W. 693. See also *Sturgeon v. Mudd*, 190 Mo. 200, 88 S. W. 630.

¹⁵ In a case where the action was not brought by the purchaser of the equity of redemption until three years after the sale, and after expenditures by the purchaser for repairs, insurance, etc., and after complainant had frequently refused to pay the debt, and appeared to

acquiesce in the action of defendant in making the improvements, the court held that the bill should be dismissed for laches, although the statute of limitations at law had not run between the time of the sale and the time of the suit brought. *Kline v. Vogel*, 90 Mo. 239, 2 S. W. 408. See also *post*, §§ 1247-1249.

¹⁶ See *Gerson v. Davis*, 143 Ala. 381, 39 So. 198; *Matt v. Fiske*, 155 Ind. 597, 58 N. E. 1053.

¹⁷ *Jackson v. Lynch*, 129 Ill. 85, 22 N. E. 246.

sume payments, and the facts showed he made no effort to pay when he could have done so; on a bill by the debtor to redeem from a sale under the mortgage, the court held that the creditor was under no duty to notify him before instituting proceedings to foreclose, and that such assent to extend the time of payment afforded no equitable ground for relief.¹⁸

Where no time of repayment is set forth in a mortgage to secure future advances, the mortgagee is not bound to wait indefinitely, but can file a bill calling upon the mortgagor to redeem within such time as equity shall decree, or to permit a sale and liquidation.¹⁹

§ 1225. Same—When to be brought.—In all cases where there is a statute regulating the time within which an action shall be brought to redeem from a mortgage, or a mortgage foreclosure, that statute must be strictly complied with.²⁰ Thus, the supreme court of Minnesota, in the case of *Gates v. Ege*,²¹ say that an action to redeem real estate from a sale made upon foreclosure of a mortgage which is a first lien upon the premises, and also from a decree afterwards made in proceedings to enforce a mechanic's lien, brought by one as owner, will be dismissed where it clearly appears that the plaintiff has permitted the time within which he should, under the statute,²² have brought his action to expire without taking steps to enforce his rights. The supreme judicial court of Massachusetts, in the case of *Flanders v. Hall*,²³ hold substantially the same doctrine. In *Pancake v. Cauffman*,²⁴ where an action was brought by the grantor to enforce an alleged equity of redemption, claiming that the deed was subject to a parol de-

¹⁸ *Seymour v. Bailey*, 66 Ill. 288.

¹⁹ *Baker v. Bailey*, 204 Pa. 524, 54 Atl. 326.

²⁰ See *Flanders v. Hall*, 159 Mass. 95, 34 N. E. 178; *Gates v. Ege*, 57 Minn. 465, 59 N. W. 495; *Pancake v. Cauffman*, 114 Pa. St. 113, 6 Atl. 67.

²¹ 57 Minn. 465, 59 N. W. 495.

²² Minn. Gen. Stat. 1878, c. 81, §§ 13, 14.

²³ 159 Mass. 95, 34 N. E. 178.

²⁴ 114 Pa. St. 113, 6 Atl. 67.

feasance, was not brought until more than twenty years after the execution of the deed, the land meanwhile having passed into the hands of a purchaser for value without notice of such equity, the court held that that fact, together with the facts that plaintiff knew of the defendant's purchase, and then made no claim of title, and surrendered the land to the defendant, and paid rent to defendant's grantor, and acquiesced in defendant's title until the value of the property largely increased, showed laches which would prevent a recovery.

§ 1226. **Defenses—Conveyance to mortgagee.**—We have already seen,²⁵ that the mortgagor may sell the equity of redemption in the mortgaged property to the holder of the mortgage, and that such an arrangement will be upheld by the courts where fairly conducted and based on a valuable consideration. In conformity with this principle, it has been said that a conveyance of mortgaged premises by the mortgagor to the mortgagee in satisfaction of the debt, is color of title; and if the grantee pays taxes on the land, while it is vacant, for more than seven years thereafter, this will constitute a good defense to a suit to redeem the premises by a person claiming by virtue of an execution sale and deed of the premises under a judgment rendered against the mortgagor before his conveyance to the mortgagee.²⁶

§ 1227. **Same—Conveying wrong lot.**—A mutual mistake is always relieved against in equity; hence, it has been said that a deed conveying another lot of land than that intended, is not wholly void, and such mistake is not a defense in favor of a third party in possession, as against the grantee's

²⁵ See *ante*, § 1047.

²⁶ *McCagg v. Heacock*, 34 Ill. 476, 85 Am. Dec. 327. See *Royal v. Lessee of Lisle*, 15 Ga. 545, 60 Am. Dec. 712; *Hassett v. Ridgley*, 49 Ill. 202; *City of St. Louis v. Gor-*

man, 29 Mo. 593, 77 Am. Dec. 586; *Bailey v. Carlton*, 12 N. H. 9, 37 Am. Dec. 190; *Green v. Kellum*, 23 Pa. St. 254, 62 Am. Dec. 332; *Edgerton v. Byrd*, 6 Wis. 527, 70 Am. Dec. 473.

mortgagee seeking to redeem from a prior mortgage.²⁷ In such a case, the mortgage is effectual to pass title as between the parties thereto.²⁸ In *Edwards v. Roys*,²⁹ the court say: "The conveyance is only void as to the person holding adversely, and those who subsequently come in under him. As to all others, the conveyance is valid, and passes the title or interest from the grantor to the grantee." In the subsequent case of *Hall v. Westcott*,³⁰ this court quoted this language, and add: "We think this doctrine is certainly true in equity."

§ 1228. **Same—Improvements with knowledge.**—The supreme court of Missouri, in the case of *Nelson v. Sarre*,³¹ say that in a suit to redeem from a purchaser at a mortgage sale, it is no defense that he has made improvements with the knowledge of the mortgagor if the improvements do not exceed the rents in value, and are in the nature of customary repairs, and there has been no loss of evidence preventing a full presentation of the case.³²

§ 1229. **Same—Mortgage fraudulent as to creditors.**—An intention to delay creditors is no defense to an action for redemption;³³ hence, where a bill to redeem is brought by a second mortgagee against the assignee of a prior mortgage, the latter cannot interpose the objection, that the second mort-

²⁷ *Hall v. Westcott*, 15 R. I. 373, 5 Atl. 629.

²⁸ *Hall v. Westcott*, 15 R. I. 373, 5 Atl. 629. See *Wade v. Lindsey*, 47 Mass. (6 Met.) 407; *Stockton v. Williams*, 1 Doug. (Mich.) 546; *Betsey v. Torrance*, 34 Miss. 132, 138; *Livingston v. Pure Iron Co.* 9 Wend. (N. Y.) 511, 523; *University of Vermont v. Joslyn*, 21 Vt. 52, 61; *Edwards v. Roys*, 18 Vt. 473.

²⁹ 18 Vt 473.

³⁰ 15 R. I. 373, 5 Atl. 629.

³¹ 75 Mo. 386.

³² This doctrine is fully sustained by the discussion upon the subject of improvements and compensation therefor, to be found, *post*, § 1231.

³³ *Crooker v. Holmes*, 65 Me. 195, 20 Am. Rep. 687; *Livingston v. Ives*, 35 Minn. 55, 27 N. W. 74; *Baldwin v. Burt*, 43 Neb. 245, 61 N. W. 601.

gage is fraudulent as to creditors of the mortgagor.³⁴ The same rule applies to a deed absolute in terms, but in intention and legal effect a mortgage.³⁵

§ 1230. **Same—Overdue second mortgage.**—The supreme judicial court of Massachusetts, in the case of *Gerrish v. Black*,³⁶ say that it is no defense to a bill to redeem from a mortgage that the defendant holds a second mortgage on the same premises which is overdue; and on a subsequent bill in equity to obtain the discharge of the second, he is not estopped to set up the second, the same not having been set up in previous proceedings.

§ 1231. **Improvements—Allowance for.**—It is a general rule that the mortgagee in possession cannot make improvements at the expense of the redemptioners,³⁷ and the making of improvements is no defense to an action to redeem from a foreclosure.³⁸ But in those cases where a purchaser under the foreclosure of a senior mortgage makes permanent improvements in good faith, with the consent, express or implied, of a junior incumbrancer who was not a party to the foreclosure, the latter, on redeeming, must pay for the improvements.³⁹ And where in redemption proceedings it appeared that defendant's purchase was with notice of the equity of redemption, but that there was no want of good faith in his assertion of title as against the owner of the equity; that plaintiff was present, but did not openly assert his claim when defendant took possession; and that plaintiff suffered defendant to expend considerable sums in making improvements

³⁴ *Crooker v. Holmes*, 65 Me. 195, 20 Am. 687; *Baldwin v. Burt*, 43 Neb. 245, 61 N. W. 601.

³⁵ *Livingston v. Ives*, 35 Minn. 55, 27 N. W. 74.

³⁶ 122 Mass. 76. See same case in 113 Mass. 486, 109 Mass. 474, 104 Mass. 400, and 99 Mass. 315.

³⁷ *Horn v. Indianapolis Nat. Bk.* 125 Ind. 381, 25 N. E. 550, 9 L.R.A. 676, 21 Am. St. Rep. 231. See *ante*, § 1189, 1205.

³⁸ See *ante*, § 1228.

³⁹ *American Button-Hole, &c. Co. v. Burlington Mut. Loan Assoc.* 68 Iowa, 326, 27 N. W. 271.

before objecting, the court held that the defendant, after the commencement of the action, might complete his improvements so as to make them useful, and might recover their value as of the time of the rendition of the decision.⁴⁰ But where, on a bill to redeem, the defendant, by the decree, is allowed his improvements, plaintiff on the hearing may show that there are no improvements;⁴¹ and in those cases where improvements have been made, he may contest their reasonableness, although he did not object to them when he saw defendant making them.⁴²

§ 1232. **Receiver on—When appointed.**—In the case of the Boston and Providence Railroad Corporation v. The New York and New England Railroad Company,⁴³ it is said that an action brought to redeem property from a mortgage foreclosure, a receiver will not be appointed of the property so long as a balance remains due to the mortgagee in possession, except in those cases where such mortgagee in possession is mismanaging the property.⁴⁴

⁴⁰ *Hadley v. Stewart*, 65 Wis. 481, 27 N. W. 380. See *Freichnecht v. Meyer*, 39 N. J. Eq. (12 Stew.) 551, reversing 38 N. J. Eq. (11 Stew.) 315.

Thus in a case where a mortgagee bid in the mortgaged premises at a sale under an execution obtained by him on a debt other than the judgment debt, the mortgagor, supposing the execution sale to be valid, surrendered possession, and the mortgagee erected improvements. On ascertaining that the sale was void, because of defects in the return, etc., the mortgagor filed a bill to redeem. The court held that, as a condition of redemption, he must pay the mortgagee the value of the improvements. *Freichnecht v. Meyer*, 39 N. J. Eq. (12

Stew.) 551, reversing 38 N. J. Eq. (11 Stew.) 315.

⁴¹ He need not pay for a building burned before he released his equity, but after the negotiation for the release was concluded. *Merriam v. Goss*, 139 Mass. 77.

⁴² *Merriam v. Goss*, 139 Mass. 77.

⁴³ 12 R. I. 220.

⁴⁴ In *Chapin v. Jones*, 11 R. I. 86, 90, 23 Am. 412, the court say: "The doctrine contended for by the plaintiff was also held by the supreme judicial court of Massachusetts in a replevin case, *Howe v. Freeman*, 80 Mass. (14 Gray) 566. But this case was carried to the supreme court of the United States and there reversed, *Freeman v. Howe*, 15 U. S. (24 How.) 450, 457, 16 L. ed. 749; where the opin-

§ 1233. Parties to action—Parties plaintiff.—As in an action to foreclose a mortgage⁴⁵ the proper party plaintiff in an action to redeem from a mortgage, whether before or after breach or sale, is the party seeking to redeem as the owner of the equity of redemption, or as one having an interest therein, the real party in interest should be the plaintiff,⁴⁶ whether he be the original mortgagor,⁴⁷ his assignee,⁴⁸ his administrator

ion was delivered by Nelson J., one of the oldest and most learned and experienced justices of the court. This case, as observed by Mr. Justice Miller, in *Buck v. Colbath*, 70 U. S. (3 Wall.) 341, 18 L. ed. 257, took the profession by surprise, as overruling the decision of the supreme judicial court of Massachusetts and the opinion of Chancellor Kent. But it was upon this very point expressly affirmed by the United States Supreme court in *Buck v. Colbath*, 70 U. S. (3 Wall.) 334, 341, 18 L. ed. 257. It is said that the marshal on execution against A has no right to levy upon the property of B, which is claimed to be the present case. The one point decided in those two later cases was, that in such a case a court from which the process issues must of necessity decide the question, and the case of *Brooks v. Montgomery*, 23 La. An. 450, is exactly in point."

⁴⁵ See *ante*, chap. v.

⁴⁶ See *Thomas v. Jones*, 84 Ala. 302, 4 So. 270; *Commercial Real Estate & Bldg. Assoc. v. Parker*, 84 Ala. 298, 4 So. 268; *Butts v. Broughton*, 72 Ala. 294; *Hudson v. Kelly*, 70 Ala. 393; *Lilly v. Dunn*, 96 Ind. 220; *Welch v. Stearns*, 69 Me. 192; *Hilton v. Lathrop*, 46 Me. 297; *Farnum v. Metcalf*, 62 Mass. (8 Cush.) Mortg. Vol. II.—103.

46; *Putnam v. Putnam*, 21 Mass. (4 Pick.) 139; *Saunders v. Frost*, 22 Mass. (5 Pick.) 259, 16 Am. Dec. 394; *Smith v. Manning*, 9 Mass. 422; *Harwood v. Underwood*, 28 Mich. 427; *Sutherland v. Rose*, 47 Barb. (N. Y.) 144; *Wandle v. Turney*, 5 Duer (N. Y.) 661; *Taggart v. Rogers*, 49 Hun (N. Y.) 265, 17 N. Y. S. R. 646; *Elliot v. Patton*, 4 Yerg. (Tenn.) 10; *Dexter v. Arnold*, 1 Sumn. C. C. 109; *Anderson v. Stather*, 2 Coll. 209; *Holland v. Baker*, 3 Hare, 68; *Throughton v. Binkes*, 6 Ves. 573, 5 Rev. 401.

⁴⁷ *Thomas v. Jones*, 84 Ala. 302, 4 So. 270; *Welch v. Stearns*, 69 Me. 192. See *Ezzell v. Watson*, 83 Ala. 120, 3 So. 309; *Downs v. Hopkins*, 65 Ala. 508; *Hudson v. Kelly*, 70 Ala. 393.

⁴⁸ *Farnum v. Metcalf*, 62 Mass. (8 Cush.) 46; *Saunders v. Frost*, 22 Mass. (5 Pick.) 259, 16 Am. Dec. 394. See *Commercial Real Estate & Bldg. Assoc. v. Parker*, 84 Ala. 298, 4 So. 268.

In a case where A gave a mortgage to B, which was assigned by B to C to secure a debt, upon condition that if B should pay the debt the assignment would be determined and become void, and the assigned premises should revert in B. The court held that a purchaser of both A's and B's interests in the prem-

or executor,⁴⁹ his heirs,⁵⁰ his wife,⁵¹ his widow,⁵² or a subsequent mortgagee.⁵³ All the owners of the equity of redemption must be made parties to the bill in equity to redeem the mortgage, or the same will be dismissed.⁵⁴ But a mortgagor who has parted absolutely with all his interest in the prop-

ises might maintain a bill in equity against C to redeem the mortgage, upon paying the amount due from B to C. *Farnum v. Metcalf*, 62 Mass. (8 Cush.) 46.

Neither the assignee of the equity of redemption, nor the assignee of the statutory right of redemption, is a proper party complainant to a bill by a mortgagor to redeem after sale; and a bill in which such persons are complainants is demurrable for misjoinder of parties. *Commercial Real Estate & Bldg. Asso. v. Parker*, 84 Ala. 298, 4 So. 268.

⁴⁹ *Wood v. Holland*, 57 Ark. 198, 21 S. W. 223; *Lilly v. Dunn*, 96 Ind. 220. See *Harwood v. Underwood*, 28 Mich. 427.

The personal representative of one of the mortgagees who is dead is a necessary party in a bill to redeem from the mortgage. *Wood v. Holland*, 57 Ark. 198, 21 S. W. 223.

Same—The mere levy of an execution upon land to which the judgment debtor never had any title, and in which he never held any leviable interest, does not constitute any lien or charge thereupon, or invest the execution creditor with any right or title, on which to found an action for the redemption of a mortgage upon the same. *Harwood v. Underwood*, 28 Mich. 427.

⁵⁰ *Lilly v. Dunn*, 96 Ind. 220.

⁵¹ *Taggart v. Rogers*, 49 Hun (N. Y.) 265, 17 N. Y. S. R. 646.

⁵² *Butts v. Broughton*, 72 Ala. 294; *Lilly v. Dunn*, 96 Ind. 220.

⁵³ *Wilson v. Hayes*, 40 Minn. 531, 42 N. W. 467, 4 L.R.A. 196, 12 Am. St. Rep. 754, 40 Alb. L. J. 8.

Thus it has been said that where a mortgagee sells the note, but executes no assignment of the mortgage securing the same, and subsequently repurchases the same, the equitable transfers of the beneficial interest in the mortgage effected by the sale and repurchase of the debt are not "assignments," within the meaning of Minn. Gen. Stat. 1878, c. 81, § 14, which the mortgagee is required to produce to the person or officer from whom he proposes to redeem. *Wilson v. Hayes*, 40 Minn. 531, 42 N. W. 467, 4 L.R.A. 196, 12 Am. St. Rep. 754, 40 Alb. L. J. 8.

⁵⁴ *Welch v. Stearns*, 69 Me. 192.

Joinder of mortgagees in a bill to redeem.—In a case where F was first mortgagee, C was second mortgagee, and C, S and W were third mortgagees, and C assigned to F the second and all his interest in the third mortgage, it was held that S and W could maintain an action to redeem without joining C as a party plaintiff, and that they could have done so, even if C had not assigned, for as to the second mortgage his interest was adverse to theirs. It was also held that redemption could be made from F, by tendering him the amount of the

erty is not a necessary party to a bill by his grantee⁵⁵ to set aside a sale under a power in the mortgage, at which the mortgagee became the purchaser, and to redeem.⁵⁶

The wife of the mortgagor, who executed the mortgage with her husband, but who was not made a party to the foreclosure action, can maintain an action during the lifetime of her husband to redeem the mortgaged premises from the sale;⁵⁷ and after his death she is properly joined with the heirs in a bill to redeem.⁵⁸ And it is said that in a suit to redeem a senior mortgage, the administrator, widow and heirs of a deceased mortgagee may join as plaintiffs.⁵⁹

§ 1234. **Same—Parties defendant.**—The general rule is that all persons who will be affected adversely by the decree,⁶⁰ and those only, should be made parties defendant on a bill to redeem.⁶¹ Where there are no outstanding interests except those of the mortgagee, he is the only proper party; but if he is only a trustee for another, his *cestui que trust* must be

first and second mortgages. *Saunders v. Frost*, 22 Mass. (5 Pick.) 259, 16 Am. Dec. 394.

⁵⁵ See *Young v. Miner*, 145 Wis. 71, 129 N. W. 781.

⁵⁶ *Thomas v. Jones*, 84 Ala. 302, 4 So. 270.

⁵⁷ *Taggart v. Rogers*, 49 Hun (N. Y.) 265, 17 N. Y. S. R. 646.

⁵⁸ *Butts v. Broughton*, 72 Ala. 294.

⁵⁹ *Lilly v. Dunn*, 96 Ind. 220.

⁶⁰ Except where mortgagee purposely complicates the case and embarrasses the parties seeking to redeem, by numerous conveyances. *Davis v. Duffie*, 18 Abb. (N. Y.) Pr. 360, 365; *Yates v. Hornby*, 2 Atk. 237. See *Dias v. Merle*, 4 Paige Ch. (N. Y.) 259; *Parlmer v. Carlisle*, 1 Sim. & S. 423.

⁶¹ See *Jones v. Richardson*, 85 Ala. 463, 5 So. 194; *Hudson v.*

Kelly, 70 Ala. 393; *Lehman v. Collins*, 69 Ala. 127; *Woodward v. Wood*, 19 Ala. 213; *Doe v. McLoskey*, 1 Ala. 708; *Essley v. Sloan*, 16 Ill. App. 63; *Millett v. Blake*, 81 Me. 531, 18 Atl. 293; *Linnell v. Layford*, 72 Me. 280; *Rowell v. Jewett*, 69 Me. 293; *Kennebec & P. R. Co. v. Portland & K. R. Co.* 54 Me. 173; *Brown v. Johnson*, 53 Me. 246; *Beals v. Cobb*, 51 Me. 348; *Haskins v. Hawkes*, 108 Mass. 379; *Stillwell v. Hamm*, 97 Mo. 579; *Copeland v. Yoakum's Adm'r.* 38 Mo. 349; *Riley v. McCord*, 21 Mo. 285; *Loney v. Courtney*, 24 Neb. 580, 39 N. W. 611; *Davis v. Duffie*, 18 Abb. (N. Y.) Pr. 365; *Johnson v. Golden*, 31 N. Y. S. R. 410, 9 N. Y. Supp. 739; *Winslow v. Clark*, 2 Lans. (N. Y.) 381; *Dias v. Merle*, 4 Paige Ch. (N. Y.) 257; *Yelver-*

made a party; ⁶² if he has sold his mortgage his grantees are necessary parties. ⁶³ Anyone apparently having an equitable interest in the premises, liable to be affected by the decree for redemption, should be made a party. ⁶⁴

Where the property has been sold under a foreclosure sale, and the state statute requires that redemption must be made from the purchaser or those claiming under him, yet if the purchaser subsequently alienates the land, the mortgagor or judgment creditor seeking to redeem must have sufficient notice to put him on inquiry that the purchaser has aliened the land and who has the title before he can be required to make

ton v. Seldon, 2 Sandf. (N. Y.) 481; *Childs v. Childs*, 10 Ohio St. 344, 75 Am. Dec. 512; *Youman v. Elmira & W. R. Co.* 65 Pa. St. 278; *Chaddick v. Cook*, 32 Beav. 70, 9 Jur. N. S. 454; *Norris v. Marshall*, 5 Madd. 475; *Wetherell v. Collins*, 3 Madd. 255; *Hobart v. Abbott*, 2 Pr. Wms. 643; *Kelso v. Norton*, 74 Kan. 442, 87 Pac. 184; *Strout v. Lord as ex'r* 103 Me. 410, 69 Atl. 694.

When a mortgage on lands, or a deed absolute in form, though in fact a mortgage, is given for the indemnity of a surety, and a purchaser from the mortgagor seeks to redeem, the debt not being satisfied, the creditor is a necessary party to the bill. *Hudson v. Kelly*, 70 Ala. 393.

In railway mortgages, all who have been so connected with the mortgages as to render them liable for income under them, should be made parties defendant. *Kennebec & P. R. Co. v. Portland & K. R. Co.* 54 Me. 173.

⁶² See *Woodward v. Wood*, 19 Ala. 213; *Wetherell v. Collins*, 3 Madd. 255.

⁶³ *Davis v. Duffie*, 18 Abb. (N. Y.) Pr. 360.

The receiver of the mortgagee is a necessary party. *Southern Mutual Building & Loan Ass'c v. Andrews*, 122 Ala. 598, 26 So. 113.

⁶⁴ *Rowell v. Jewett*, 69 Me. 293. See *Millett v. Blake*, 81 Me. 531, 10 Am. St. Rep. 275, 18 Atl. 293; *Pierce v. Le Monier*, 172 Mass. 508, 53 N. E. 125; *Crummett v. Littlefield as adm'r etc.* 98 Me. 317, 56 Atl. 1053; *First National Bank v. Elliott*, 125 Ala. 646, 47 L.R.A. 742, 82 Am. St. Rep. 268, 27 So. 7; *Marbury Lumber Co. v. Posey*, 142 Ala. 394, 38 So. 242; *Sadler v. Jefferson*, 143 Ala. 669, 39 So. 380.

The heirs at law of a deceased partner are proper if not necessary parties to a bill to redeem lands which were mortgaged to the partnership. *Whisenhant v. Hybart*, 160 Ala. 578, 49 So. 760.

As assignee of a mortgage, although he has no interest in it at the time of an attachment of the equity of redemption, is a proper party to a bill to redeem, no tender to him or demand for account is necessary. *Millett v. Blake*, 81 Me.

tender to the alienee.⁶⁵ And it has been said that where the purchaser of premises at foreclosure sale, in an action to which the owner of the equity of redemption was not made a party, mortgages the same premises, which, on foreclosure sale under the latter mortgage are purchased by another than the mortgagee, such mortgagee having parted with all interest in the premises, is not a proper party to an action to redeem, and does not become such by an allegation that she is collecting rents, where she does not claim to be a mortgagee in possession.⁶⁶

The supreme court of Nebraska, in the case of *Loney v. Courtney*,⁶⁷ say that the fact that the defendants in an action in equity to redeem from a void mortgage foreclosure are donees of the mortgage, if they are in fact the owners thereof, will not bar their right to recover from the mortgagor what is equitably due.

In those states where the mortgage does not carry the present title to the land, on the death of the mortgagee his personal representative is the only necessary party;⁶⁸ but in all those jurisdictions in which the common law theory of mortgages prevail, it is thought the heir-at-law, legatee, devisee and other person in whom the estate is vested is a necessary party to the action.⁶⁹

531, 10 Am. St. Rep. 275, 18 Atl. 293.

⁶⁵ *Lehman v. Collins*, 69 Ala. 127.

⁶⁶ *Johnson v. Golder*, 31 N. Y. S. R. 410, 9 N. Y. Supp. 739.

⁶⁷ 24 Neb. 580, 39 N. W. 611.

⁶⁸ *Copeland v. Yoakum's Adm.* 38 Mo. 349.

⁶⁹ See *Jones v. Richardson*, 85 Ala. 463, 5 So. 194; *Haskins v. Hawkes*, 108 Mass. 379; *Copeland v. Yoakum's Adm.* 38 Mo. 349; *Riley's Adm. v. McCord's Adm.* 21 Mo. 285; *Osburn v. Fallows*, 1 Russ. & M. 741.

In *Haskins v. Hawkes*, *supra*, the court say: "The children and heirs of the Hawkes, who are made defendants in the bill, entered the mortgaged premises to foreclose, and took the rents and profits. But they were mistaken in supposing they had such a title as would enable them to foreclose," citing *Palmer v. Stevens*, 65 Mass. (11 Cush.) 147; *Foy v. Cheney*, 31 Mass. (14 Pick.) 404; *Smith v. Dyer*, 16 Mass. 18.

§ 1235. **The decree—Generally.**—The redemption of a mortgage will not be decreed on any terms other than the payment of the mortgagee's claim and costs;⁷⁰ and the decree, where the plaintiff prevails, usually requires this to be done by a day named, in default to be perpetually foreclosed, and the bill be dismissed with costs.⁷¹ In those cases where it is found that nothing is due the mortgagee, the decree will be for the possession of the mortgaged premises, and awarding a writ of possession.⁷² In Michigan, on a bill to redeem, the decree should provide that if the redemption money is not paid in accordance with the decree, the remedy will be by sale as on foreclosure, and not by strict foreclosure.⁷³

In those cases where it is sought to redeem from an irregular or invalid foreclosure sale, it is thought that the decree should not provide redemption from a void sale, but from an unforeclosed security.⁷⁴

It is thought that a decree of redemption from a foreclosure sale under a power in a mortgage, providing that if the amount required to be paid by way of redemption is not paid within the time named the mortgage shall stand fore-

⁷⁰ *Cowles v. Marble*, 37 Mich. 158.

⁷¹ *Segrest v. Segrest's Heirs*, 38 Ala. 674; *Bremer v. Calumet Canal Co.* 127 Ill. 464; *Pitman v. Thornton*, 66 Me. 469; *Cowles v. Marble*, 37 Mich. 158; *Hazard v. Robinson*, 15 R. I. 226 2 Atl. 433; *Gage v. Porter*, 64 N. H. 619, 15 Atl. 147.

A decision giving a complainant leave to redeem on the payment of the mortgage debt is a determination in his favor, where no other relief is sought. *Gage v. Porter*, 64 N. H. 619, 15 Atl. 147, and is a final decree. *Hazard v. Robinson*, 15 R. I. 226, 2 Atl. 433.

Where a mortgagor asks for an injunction, prays for an account, and offers to pay whatever shall be

found due, a decree may be rendered in defendant's favor without a cross-bill. *Polk v. Mitchell*, 85 Tenn. 634.

Where a cross bill prays to be allowed to redeem from a foreclosure, a decree directing the payment of a certain sum to redeem should not direct a conveyance, by the party, and, in default thereof, by a master in chancery, but should conclude that, in default of paying the amount required, the cross bill should be dismissed. *Bremer v. Calumet & C. Canal & D. Co.* 127 Ill. 464, 18 N. E. 321.

⁷² *Gerrish v. Block*, 122 Mass. 76.

⁷³ *Meigs v. McFarlan*, 72 Mich. 194, 40 N. W. 246.

⁷⁴ *Grover v. Fox*, 36 Mich. 461.

closed, is not on its face erroneous because it does not provide for a sale on failure to redeem, in those cases where plaintiffs do not ask for a sale or a modification of the decree.⁷⁵ But where a judgment is entered, fixing the amount due, and providing that either party may apply to the court for further directions, an application for a reference to ascertain the value of the use of the premises will be denied.⁷⁶

§ 1236. Same—Time of redemption after decree.—The time within which a redemption may be made where the plaintiff prevails, is in the discretion of the court, in the absence of a controlling statute, and is usually regulated by the circumstances of each particular case;⁷⁷ but it is usually six

⁷⁵ *Martin v. Ratcliff*, 101 Mo. 254, 20 Am. St. Rep. 605, 13 S. W. 1051.

The supreme court of Indiana say that where, in the special finding in proceedings to redeem, it is not stated that the principal, interest, and costs of the judgment were paid, or that the principal and interest of the mortgage were paid, the inference is that the redemption was not from the decree, but from the mortgage. Where the plaintiffs were not bound by the decree, they had a right to redeem from the mortgage, irrespective of the decree. The amount they were bound to pay to entitle them to redeem depended upon the covenants of the mortgage, and the rights of the mortgagee in possession under the mortgage. The rights of the parties, both the mortgagee and the redemptioners, must be determined from the mortgage, and not from the decree. *Johnson v. Hosford*, 110 Ind. 572, 10 N. E. 407.

⁷⁶ *Hollingsworth v. Campbell*, 28 Minn. 18.

A conditional judgment, rendered on a writ of entry brought by a mortgagee against the mortgagor in possession, is not conclusive as to the amount then due against a purchaser of the equity of redemption before the bringing of the writ, on a bill in equity by him to redeem. Nor is such purchaser concluded as to the amount due by the fact that he was made a party to a foreclosure proceeding in another state, the mortgage covering land there as well as in the state wherein the purchaser seeks to redeem, and in that proceeding, the value of the land in that state having been determined. *Dooley v. Potter*, 140 Mass. 49.

⁷⁷ *Bremer v. Callumet & C. Canal & Dock Co.* 127 Ill. 464, 18 N. E. 321; *Decker v. Patton*, 20 Ill. App. 210, aff'd 120 Ill. 464, 11 N. E. 897; *Dennett v. Cadman*, 158 Mass. 371, 33 N. E. 574; *Mills v. Stehle*, 22 Neb. 740, 36 N. W. 142; *Murphy v. New Hampshire Sav. Bank*, 63 N. H. 362; *Clark v. Rey-*

months,⁷⁸ or a year.⁷⁹ One who procures a decree allowing him to redeem within a specified time on the happening of a certain contingency is bound by the decree.⁸⁰ He cannot, six years afterwards, seek to avoid it.⁸¹ But it is said that where on a bill to redeem, a decree is rendered fixing the amount and time of payment, the fact that the mortgagor fails to make such payment does not make the foreclosure absolute without any further order, so as to bar the right to redeem; and if the mortgagee thereafter receives rents from the tenants in possession, no further proceedings can be had until there has been a new accounting and a new order fixing the amount and time of payment.⁸²

burn, 75 U. S. (8 Wall.) 318, 324, 19 L. ed. 354, 356.

In an action by a first mortgagee who has foreclosed and purchased a decree to compel a junior mortgagee to redeem, is not void for failure to provide within what time he may redeem. *Evans v. Atkins*, 75 Iowa, 448, 39 N. W. 702.

A decree in an ordinary bill to redeem in which no peculiar relief is prayed for, and where there has been no suggestion that the plaintiffs are not ready to perform the offer in the bill, properly requires them to redeem within a time stated, instead of allowing redemption at any time before a valid and effectual foreclosure of the mortgage by a new execution of the power of the sale therein, or otherwise. *Dennett v. Codman*, 158 Mass. 371, 33 N. E. 574.

⁷⁸ *Decker v. Patton*, 20 Ill. App. 210, aff'd 120 Ill. 464, 11 N. E. 897; *Hollingsworth v. Koon*, 117 Ill. 511, 6 N. E. 148, 8 Id. 193; *Perrine v. Dunn*, 4 John. Ch. (N. Y.) 140;

Waller v. Harris, 7 Paige Ch. (N. Y.) 167; *Dunham v. Jackson*, 6 Wend. (N. Y.) 22; *Stephenson v. Kilpatrick*, 166 Mo. 262, 65 S. W. 773.

⁷⁹ *Murphy v. New Hampshire Sav. Bk.* 63 N. H. 362. See *Hollingsworth v. Campbell*, 28 Minn. 18, 8 N. W. 873; *Lucken v. Fickle*, 42 Ind. App. 445, 84 N. E. 561.

The provision of Minn. Gen. St. 1878, c. 81, § 43, that "in case of strict foreclosure, no final decree of foreclosure shall be rendered until the lapse of one year after the judgment adjudging the amount due on such mortgage," applies to a judgment in an action to redeem, so that it is erroneous if it limits the time for redemption to a period less than one year from the judgment. *Hollingsworth v. Campbell*, 28 Minn. 18, 8 N. W. 873.

⁸⁰ *Brown v. Webber*, 103 Me. 60, 68 Atl. 456.

⁸¹ *Kolle v. Clausheide*, 99 Ind. 97.

⁸² *Tetrault v. Labbe*, 155 Mass. 497, 30 N. E. 173.

§ 1237. Same—Same—Extension.—Upon a bill to redeem, judgment in favor of plaintiff and a decree that the mortgage debt and costs shall be paid and redemption made within a specified time, the time stated in the decree will not be extended so as to permit a redemption to be made after the time fixed has elapsed.⁸³ Thus, in a case where, upon a bill to redeem, a decree was rendered, requiring the complainant to pay into court by a day certain the amount reported to be due on the mortgage debt, and ordering his bill to be dismissed on his failure to make the payment within the prescribed time, the court held that there was no error in refusing to extend the time and in dismissing the bill after default, as the case was not shown to be one of fraud, accident, or mistake, unmixed with negligence on the part of the complainant himself.⁸⁴

An extension of time, however, is in the sound discretion of the court, and will usually be granted where the failure to pay at the designated time was occasioned by fraud, accident, or mistake, or to enable contribution to the redemption fund

⁸³ *Segrest v. Segrest's Heirs*, 38 Ala. 674.

The earliest decision upon the question whether the chancellor will allow an extension of the time prescribed in his decree for the payment of the mortgage debt, is that of Lord Eldon in *Novosietski v. Wakefield*, 17 Ves. 417. In that case the lord chancellor distinguished between suits in foreclosure and suits to redeem, and while he concedes that the practice is to extend the time in the former case, he denies that there is any precedent for the extension in the latter, and refuses to begin such a practice. The reason given for the decision is, that the mortgagor's at-

titude in the case is altogether different. In the foreclosure suit the proceeding is against him, to compel the payment of the debt, or effect a forfeiture of his estate. While, in a redemption suit, "he comes into court saying, 'here is the money, give me my estate.'" Lord Eldon's decision is followed in *Falkner v. Bolton*, 7 Sim. 319. See *Perrine v. Dunn*, 4 John. Ch. (N. Y.) 140; *Brinckerhoff v. Lansing*, 4 John. Ch. (N. Y.) 65, 8 Am. Dec. 538; *Waller v. Harris*, 7 Paige Ch. (N. Y.) 167; *Smith v. Bailey*, 10 Vt. 163; *Turner v. Turner*, 3 Murp. (Va.) 66.

⁸⁴ *Segrest v. Segrest's Heirs*, 38 Ala. 674.

to be made,⁸⁵ but not where the plaintiff's negligence has contributed to such failure.⁸⁶

§ 1238. **Same—Where sold in parcels.**—In the case of *Smith v. Buse*,⁸⁷ the mortgage covered a great many separate parcels of land, which, at the foreclosure, were sold separately to various persons, and a mortgagor brought an action against the purchasers to have the sale adjudged void and for leave to redeem from the mortgage, and judgment in that action was rendered in favor of the defendant, the court held, on appeal, that this was not *res judicata* upon the claim of any purchaser to have acquired the title to any particular lot of the mortgaged premises.

§ 1239. **Same—On bill by widow.**—We have already seen that the wife or widow may maintain a bill to redeem.⁸⁸ It is said that in an action by a widow to redeem from a foreclosure of a mortgage given by her husband alone for the purchase price of land, and foreclosed in his lifetime, without her being made a party, if anything is found due on the mortgage, a decree should be rendered for the sale of the two-thirds of the land held by the defendant, and, in case of a failure to realize a sum sufficient to pay the same, then for the sale of the plaintiff's one-third.⁸⁹

§ 1240. **Same—Sale not decreed.**—It is thought that in the absence of any circumstances taking the case out of the

⁸⁵ See *ante*, §§ 1208, 1212.

⁸⁶ *Segrest v. Segrest's Heirs*, 38 Ala. 674. See *Emmons v. Vauzle*, 78 Mich. 171; *Ciley v. Huse*, 40 N. H. 362; *Brinkerhoff v. Lansing*, 4 John. Ch. (N. Y.) 65, 8 Am. Dec. 538; *Kopper v. Dyer*, 39 Vt. 477, 59 Am. Dec. 742. See *Kolle v. Clausheide*, 99 Ind. 100; *Perrine v. Dunn*, 4 John. Ch. (N. Y.) 140; *Brinkerhoff v. Lansing*, 4 John. Ch. (N.

Y.) 65, 8 Am. Dec. 538; *Chicago D. & V. R. Co. v. Fosdick*, 106 U. S. 47, 27 L. ed. 47, 1 Supt. Ct. Rep. 10; *Jenkins v. Eldridge*, 1 Woodb. & M. C. C. 61; *Monkhouse v. Bedford*, 2 Madd. 382.

⁸⁷ 35 Minn. 234, 28 N. W. 220.

⁸⁸ See *ante*, §§ 1133, 1134.

⁸⁹ *Barr v. Van Alstine*, 120 Ind. 590, 22 N. E. 965

ordinary rule, the complainant in a bill to redeem will not be granted a decree of sale as in a foreclosure, subject to the statutory right of redemption.⁹⁰

§ 1241. **Same—Accounting for value.**—In those cases where the mortgaged property has been sold or used by the mortgagee, or its condition changed so that it cannot be restored to the mortgagor, the only relief available to the latter in an action to redeem is to have an accounting and be allowed the value of the property when taken from him.⁹¹ In the case of *Adams v. Sayre*,⁹² on a bill by a mortgagor to redeem on the ground that the purchaser bought by collusion with the mortgagee, or in the alternative, that he was plaintiff's agent and could not purchase for himself, the chancellor decreed relief without stating under which aspect of the bill, and ordered the register to state an account. On affirmance of this decree under the second aspect, the court held that the chancellor might modify his instructions to the register as to the principles on which the account should be stated.⁹³

§ 1242. **Same—Appeal and new trial.**—It has been said the right to appeal from a decree of the circuit court in foreclosure, which wrongfully denied the right to redeem, is absolute and does not depend upon any offer to redeem within the time allowed thereby by statute.⁹⁴ The supreme court of Indiana say that in a suit to redeem and procure the cancellation of a mortgage, although the complaint prays for the quieting of title, a new trial as of right cannot be had.⁹⁵ The rule is well settled that a reviewing court will not reverse a decree in

⁹⁰ *Decker v. Patton*, 20 Ill. App. 210; *Gillis v. Martin*, 2 Dev. (N. C.) Eq. 470, 25 Am. Dec. 729.

⁹¹ *Mowery v. First Nat. Bk. Baraboo*, 54 Wis. 38, 11 N. W. 247.

⁹² 76 Ala. 509.

⁹³ *Adams v. Sayre*, 76 Ala. 509.

⁹⁴ *Mason v. Northwestern Mut. L. Ins. Co.* 106 U. S. 163, 27 L. ed. 129.

⁹⁵ *Voss v. Eller*, 109 Ind. 260, 10 N. E. 74.

chancery for an immaterial departure from the technical rules, when it can see that no harm has resulted to the appellant.⁹⁶

§ 1243. **Costs on redemption.**—The general rule is that in an action to redeem the costs must be paid by the plaintiff, even where he prevails;⁹⁷ but they may be imposed upon the defendant if he unreasonably refuses to receive the money when it is tendered to him,⁹⁸ or sets up an unconscionable or frivolous defense causing unnecessary delay and expense.⁹⁹ In those cases where both parties are equally at fault a court of equity will divide the costs.¹ In the case of *Hall v. Gardner*,² it is said that where a mortgagee, upon a request in writing, from the mortgagor, for an account in writing for the amount due on the mortgage, renders an account which is im-

⁹⁶ *Allis v. Ins. Co.* 197 U. S. 144. See *De Bartlett v. De Wilson*, 52 Fla. 497, 42 So. 189.

⁹⁷ *Lamb v. Jaffrey*, 47 Mich. 28, 10 N. W. 65. See *Blum v. Mitchell*, 59 Ala. 535; *Harper v. Ely*, 70 Ill. 581; *Horsford v. Johnson*, 74 Ind. 479; *Hall v. Gardner*, 71 Me. 233; *Turner v. Johnson*, 95 Mo. 431, 6 Am. St. Rep. 62; *Bean v. Brackett*, 35 N. H. 88; *Forman v. Bulson*, 30 N. J. Eq. (3 Stew.) 493; *Phillips v. Hulsizer*, 20 N. J. Eq. (5 C. E. Gr.) 308; *Gage v. Brewster*, 31 N. Y. 218; *Vroom v. Ditmas*, 4 Paige Ch. (N. Y.) 526; *Benedict v. Gilman*, 4 Paige Ch. (N. Y.) 58; *Brockway v. Wells*, 1 Paige Ch. (N. Y.) 617; *Slee v. Manhattan Co.* 1 Paige Ch. (N. Y.) 48; *Moore v. Cord*, 14 Wis. 213; *Wetherell v. Collins*, 3 Madd. 255; *Lynch v. Ryan*, 137 Wis. 13, 129 Am. St. Rep. 1040, 118 N. W. 174; *Liskey v. Snyder*, 56 W. Va. 610, 49 S. E. 515. See *Ryer v. Morrison*, 21 R. I. 127, 42 Atl. 509.

⁹⁸ *Meigs v. McFarlan*, 72 Mich. 194, 40 N. W. 246; *Lamb v. Jaffrey*, 47 Mich. 28, 10 N. W. 65; *King v. Duntz*, 11 Barb. (N. Y.) 191; *Van Buren v. Olmstead*, 5 Paige Ch. (N. Y.) 9; *Harmer v. Priestly*, 16 Beav. 569; *Grugeon v. Gerrard*, 4 Young & C. 128.

⁹⁹ *Turner v. Johnson*, 95 Mo. 431; *Davis v. Duffie*, 18 Abb. (N. Y.) Pr. 360; *Seeley v. Manhattan Co.* 1 Paige Ch. (N. Y.) 81; *Brockway v. Wells*, 1 Paige Ch. (N. Y.) 618; *Barton v. May*, 3 Sandf. Ch. (N. Y.) 450; *Still v. Bouzzell*, 60 Vt. 478; *Ryer v. Morrison*, 21 R. I. 127, 42 Atl. 509; *Taylor v. Colville*, 20 App. Div. 581, 47 (N. Y.) Supp. 267. See *Lynch v. Ryan*, 137 Wis. 13, 129 Am. St. Rep. 1040, 118 N. W. 174. See also *De Leonis v. Walsh, as adm'r etc.* 140 Cal. 175, 73 Pac. 813.

¹ *Perdue v. Brooks*, 85 Ala. 459, 5 So. 126; *Hollingsworth v. Koon*, 117 Ill. 511, 6 N. E. 148, 8 Id. 193.

² 71 Me. 233.

perfect and inaccurate, he will be liable to costs on a bill in equity to redeem, if the mortgage is redeemed within the time named in the decree of the court.

The court of chancery of New Jersey, in the case of *Forman v. Bulson*,³ say the fact that the evidence to prove defeasible a deed absolute on its face is very conflicting, and that the conclusion that it was merely a mortgage was reached only by the preponderance of the evidence, is a good reason for adhering to the general rule that the mortgagee is entitled to his costs on a bill to redeem.

³ 30 N. J. Eq. (3 Stew.) 493.

CHAPTER XLVI.

REDEMPTION—BAR OF RIGHT OF.

- § 1244. By foreclosure.
- § 1245. By judgment.
- § 1246. By estoppel.
- § 1247. By lapse of time.
- § 1248. By laches.
- § 1249. By Statute of limitations.
- § 1250. Same—When statute begins to run.
- § 1251. Same—Disability.
- § 1252. By adverse possession.
- § 1253. By purchase by mortgagee.
- § 1254. Tender does not revive.
- § 1255. Waiver.
- § 1256. Same—By acknowledgment.

§ 1244. By foreclosure.—We have already seen⁴ that the right of redemption of mortgaged property may be effectually extinguished and barred by a valid foreclosure, to which all the persons having or claiming to have an interest in the mortgaged premises have been made parties; we have also seen⁵ that persons in interest who are not made parties to the foreclosure proceedings are not affected thereby, and for that reason are entitled to redeem therefrom.⁶ Thus the supreme

⁴ See *ante*, § 1055.

⁵ See *ante*, § 1111.

⁶ *Wiley v. Ewing*, 47 Ala. 418; *Hodgen v. Guttery*, 58 Ill. 431; *Strang v. Allen*, 44 Ill. 428; *Smith v. Sinclair*, 10 Ill. 108; *Nesbit v. Hanway*, 87 Ind. 400; *Murdock v. Ford*, 17 Ind. 52; *Bunce v. West*, 62 Iowa, 80, 17 N. W. 179; *Ayers v. Adair County*, 61 Iowa, 728, 17 N. W. 161; *American Buttonhole, etc. Co. v. Burlington Mut. Loan Assoc.* 61 Iowa, 464, 16 N. W. 527; *Wright v. Howell*, 35 Iowa, 290; *Gower v. Winchester*, 33 Iowa 301; *Anson v. Anson*, 20 Iowa, 55, 89 Am. Dec. 514; *Johnson v. Harman*, 19 Iowa, 56; *Bates v. Ruddick*, 2 Iowa, 423, 65 Am. Dec. 774; *Mincer v. Beekman*, 50 N. Y. 337; *Sellwood v. Gray*, 11 Oreg. 534, 5 Pac. 196; *Pratt v. Frear*, 13 Wis. 462; *Murphy v. Farwell*, 9 Wis. 102, 2 Wis. 533.

court of Ohio, in the case of *Endel v. Leibrock*,⁷ say that to bar the equity of redemption of a non-resident mortgagor, upon whom service of summons cannot be personally made, must be constructively served as required by the Code,⁸ and a judgment of foreclosure sale without such notice will not be a bar to an action to redeem.

§ 1245. **By judgment.**—A bill to foreclose may be barred by a judgment of dismissal of a former suit for the same purpose, in those cases where the merits were inquired into on the former trial; but where the merits were not thus inquired into on the former trial the defendants cannot set up the former record as a bar to a subsequent action.⁹ Where a bill to redeem has been dismissed on the merits, but without any direction that the dismissal shall be without prejudice, it may be pleaded in bar to a new bill for the same purpose;¹⁰ but in those cases where a dismissal is qualified, it is not regarded as an adjudication on the merits of the subjects of the controversy, and is not a bar to the bringing of a second bill to redeem between the same parties.¹¹

§ 1246. **By estoppel.**—We have already seen¹² that the mortgagor and those claiming under him, may be estopped

⁷ 33 Ohio St. 254.

⁸ Ohio Code, § 72.

⁹ *Bostwick v. Abbott*, 16 Abb. (N. Y.) Pr. 419, 40 Barb. (N. Y.) 333; *Holmes v. Remsen*, 7 John. Ch. (N. Y.) 286; *Perine v. Dunn*, 4 John. Ch. (N. Y.) 140.

¹⁰ *Perine v. Dunn*, 4 John. Ch. (N. Y.) 140; *Badger v. Badger*, 1 Cliff. C. C. 246.

¹¹ *Perine v. Dunn*, 4 John. Ch. (N. Y.) 140; *Burton v. Burton*, 58 Vt. 420, 5 Atl. 281. See *Foote v. Gibbs*, 67 Mass. (1 Gray.) 412; *Bigelow v. Windsor*, 67 Mass. (1 Gray.) 301; *Sewall v. East-*

ern R. Co. 63 Mass. (9 Cush.) 5; *Gove v. Lyford*, 44 N. H. 525; *Mills v. Mills*, 18 N. J. Eq. (3 C. E. Gr.) 444; *Durrant v. Essex Co.* 74 U. S. (7 Wall.) 107, 19 L. ed. 154; *Hughes v. United States*, 71 U. S. (4 Wall.) 232, 18 L. ed. 303; *Walden v. Bodley*, 39 U. S. (14 Pet.) 156, 10 L. ed. 398; *Stevens v. Guppy*, 3 Russ. 171; *Lindsay v. Lynch*, 2 Sch. & L. 1, 9 Rev. Rep. 54; *Woolam v. Hearn*, 7 Ves. 211, 6 Rev. Rep. 113; *Townshend v. Stangroom*, 6 Ves. 328, 5 Rev. Rep. 312.

¹² See *ante*, § 1061.

by their own acts from exercising the right of redemption from a person who has purchased the land at foreclosure sale.¹³ Thus it has been said that a subsequent mortgagee will be estopped to redeem the premises, as against a prior mortgagee's assignee, where such subsequent mortgagee was instrumental in inducing the purchasing, by an assurance that he would never redeem the mortgaged premises;¹⁴ and we have heretofore seen that a party may be estopped by merely standing idly by and not disclosing his titles or rights when he should speak;¹⁵ because in equity when a man fails to speak when he should, and others upon the strength of his silence have acquired rights, will be restrained from speaking when he would.¹⁶

§ 1247. By lapse of time.—It is well established that lapse of time may be a bar to the right to redeem from fore-

¹³ *Fay v. Valentine*, 29 Mass. (12 Pick.) 40, 22 Am. Dec. 397; *Foster v. Briggs*, 3 Mass. 313; *Parkhurst v. Van Cortland*, 14 John. (N. Y.) 15, 7 Am. Dec. 427, 1 John Ch. (N. Y.) 274; *Niven v. Belknap*, 2 John 273; *Wright v. Whitehead*, 14 Vt. 268; *Beckett v. Cordley*, 1 Bro. C. C. 357; *Northern Counties of England Fire Ins. Co. v. Whipp* (1884), 26 Ch. Div. 482, 488, 53 L. J. Ch. 629; *Taylor v. Russell* (1891), 1 Ch. 8, 60 L. J. Ch. 1; *Hanning v. Ferrers*, 1 Eq. Cas. Abbr. 357; *Canton v. Canton*, L. R. 1 Ch. 143, 147, L. R. 2 H. L. 127; *Savage v. Foster*, 9 Mod. 35; *Mocatta v. Murgatroyd*, 1 Pr. Wms. 494; *Hawkins v. Homes*, 1 Pr. Wms. 70; *Peter v. Russell*, 2 Vern. 726; *Raw v. Pote*, 2 Vern. 239; *Hunsden v. Cheyney*, 2 Vern. 148, 150; *Hobbs v. Norton*, 1 Vern. 136; *Evans v. Bicknell*, 6 Ves. 174, 190, 5 Rev.

Rep. 245; *Welford v. Beezely*, 1 Ves. Sr. 6, 1 Fonbl. Eq. 161.

¹⁴ *Fay v. Valentine*, 29 Mass. (12 Pick.) 40, 22 Am. Dec. 397.

¹⁵ *Ante*, § 1061. See *Fay v. Valentine*, 29 Mass. (12 Pick.) 40, 22 Am. Dec. 397; *Foster v. Briggs*, 3 Mass. 313; *Parkhurst v. Van Cortland*, 14 John. (N. Y.) 15, 7 Am. Dec. 427, 1 John Ch. (N. Y.) 274; *Niven v. Belknap*, 2 John. (N. Y.) 273; *Beckett v. Cordley*, 1 Bro. C. C. 357; *Hanning v. Ferrers*, 1 Eq. Cas. Abbr. 357; *Savage v. Foster*, 9 Mod. 35; *Mocatta v. Murgatroyd*, 1 Pr. Wms. 494; *Raw v. Pote*, 2 Vern. 239; *Hunsden v. Cheyney*, 2 Vern. 148, 150; *Hobbs v. Norton*, 1 Vern. 136; *Evans v. Bicknell*, 6 Ves. 174, 190, 5 Rev. Rep. 245; *Welford v. Beezely*, 1 Ves. Sr. 6, 1 Fonbl. Eq. 161.

¹⁶ *Niven v. Belknap*, 2 John. (N. Y.) 589; *Wright v. Whitehead*, 14 Vt. 268.

closure; ¹⁷ the statute of limitations ¹⁸ being applied by analogy. The time required to bar a right of redemption is, in the absence of any statutory provision, the common law period of twenty years; ¹⁹ but the act of the mortgagee, or those claiming

¹⁷ See *Fluck v. Braman*, 101 S. W. 537 (Tex. Civ. App.)

¹⁸ See *Lindberg v. Thomas*, 137 Iowa, 48, 114 N. W. 562; *Tuteur v. Brown*, 74 Miss. 774, 21 So. 748; *Gray v. Williams*, 130 N. C. 53, 40 S. E. 843; *Houston v. National Mutual Building & Loan Ass'c.* 80 Miss. 31, 92 Am. St. Rep. 565, 31 So. 540. See *post*, § 1148.

In *North Dakota*, the statutory period is ten years. *Nash v. Northwest Land Co.* 15 N. D. 566, 108 N. W. 792.

In *South Dakota*, the statutory period is ten years. *Houts v. Olson*, 14 S. D. 475, 85 N. W. 1015.

¹⁹ See *Coyles v. Wilkins*, 57 Ala. 108; *Byrd v. McDaniel*, 33 Ala. 18; *McArthur v. Carrie's Adm'r* 32 Ala. 75, 70 Am. Dec. 529; *Gunn v. Brantley*, 21 Ala. 633, 644; *Maury v. Mason*, 8 Port. (Ala.) 211; *Guthrie v. Field*, 21 Ark. 379; *Taylor v. McClain*, 60 Cal. 651, 64 Id. 513; *Arrington v. Liscom*, 34 Cal. 366, 94 Am. Dec. 722; *Grattan v. Wiggins*, 23 Cal. 16; *Jarvis v. Woodruff*, 22 Conn. 548; *Bunce v. Wolcott*, 2 Conn. 27; *Davidson v. Lawrence*, 49 Ga. 335; *Morgan v. Morgan*, 10 Ga. 297; *Goodell v. Dewey*, 100 Ill. 308; *Locke v. Caldwell*, 91 Ill. 419; *Hallesy v. Jackson*, 66 Ill. 139; *Lindsey v. Delano*, 78 Iowa, 350, 43 N. W. 218; *Crawford v. Taylor*, 42 Iowa, 260; *Montgomery v. Chadwick*, 7 Iowa, 114; *McPherson v. Hayward*, 81 Me. 329, 17 Atl. 164; *Randall* Mortg. Vol. II.—104.

v. Bradley, 65 Me. 43; *Roberst v. Littlefield*, 48 Me. 61; *Blethen v. Dwinal*, 35 Me. 556; *Crook v. Glenn*, 30 Md. 55, 70; *Hertle v. McDonald*, 2 Md. Ch. 128, 3 Md. 366; *Stevens v. Dedham Savings Inst.* 129 Mass. 547; *Ayres v. Waite*, 64 Mass. (10 Cush.) 72; *Hoffman v. Harrington*, 33 Mich. 392; *Reynolds v. Greening*, 10 Mich. 355; *Cook v. Finkler*, 9 Mich. 131; *Anding v. Davis*, 33 Miss. 574; *Cape Girardeau Company v. Harbison*, 56 Mo. 96; *Ford v. Wilson*, 35 Miss. 490, 72 Am. Dec. 137; *McNair v. Lot*, 34 Mo. 285, 84 Am. Dec. 78; *Tripp v. Marcy*, 39 N. H. 439; *Chapin v. Wright*, 41 N. J. Eq. (14 Stew.) 438, 5 Atl. 574; *Miner v. Beekman*, 50 N. Y. 337, 14 Abb. (N. Y.) Pr. N. S. 1; *Demarest v. Wynkoop*, 3 John. Ch. (N. Y.) 129, 135, 8 Am. Dec. 467; *Moore v. Cable*, 1 John. Ch. (N. Y.) 385; *Bailey v. Carter*, 7 Ired. (N. C.) Eq. 282; *Martin v. Jackson*, 27 Pa. St. 504, 67 Am. Dec. 489; *Wood v. Jones*, 1 Meigs. (Tenn.) 513; *Yarborough v. Newell*, 10 Yerg. (Tenn.) 376; *Hammond v. Hopkins*, 3 Yerg. (Tenn.) 529; *Ross v. Norvell*, 1 Wash. (Va.) 14, 1 Am. Dec. 422; *Knowlton v. Walker*, 13 Wis. 264; *Brobst v. Brock*, 77 U. S. (10 Wall.) 152; sub nom *Doe ex d. Brobst v. Roe*, 19 L. ed. 1002; *Slicer v. Pittsburg*, 57 U. S. (16 How.) 571, 14 L. ed. 1063; *Elmendorf v. Taylor*, 23 U. S. (10 Wheat.) 152, 6 L. ed. 289; *Hughes*

under him, must be unequivocal. He must not enter as the tenant of the mortgagor, and if he does that relation will be pre-

v. Edwards, 22 U. S. (9 Wheat.) 489, 6 L. ed. 142; *Fox v. Blossom*, 17 Blatchf. C. C. 352; *Amory v. Lawrence*, 3 Cliff. C. C. 523; *Dexter v. Arnold*, 1 Sumn. C. C. 117; *Doe v. DeVeber*, 3 Allen (N. B.) 23; *Anonymous*, 3 Atk. 313; *Blake v. Foster*, 2 Ball. & B. 402; *Cholmondeley v. Clinton*, 2 Jack & W. 187; *Chapman v. Corpse*, 41 L. T. N. S. 22; *Barron v. Martin*, 19 Ves. 327; *Nichols v. Tingstad*, 10 N. D. 172, 86 N. W. 694; *Becker v. McCrea*, 193 N. Y. 423, 23 L.R.A. (N.S.) 754, 86 N. E. 463; *Munro v. Barton*, 98 Me. 250, 56 Atl. 844.

In *Indiana* the period of limitations is fifteen years. *Turpie v. Lowe*, 158 Ind. 314, 92 Am. St. Rep. 310, 62 N. E. 484; *Sinclair v. Gunzenhauser*, 98 N. E. 37 (Ind.)

In *Iowa* the statutory period is ten years. *Adams v. Holden*, 111 Iowa, 54, 82 N. W. 468.

In *Nebraska*, an action to redeem is not barred until ten years after the mortgagee enters into possession. *Clark v. Hannafeldt*, 79 Neb. 566, 113 N. W. 135.

In *Washington*, the mortgagor's right to redeem is barred after seven year's possession by the purchaser. *Johnson v. Bartlett*, 50 Wash. 114, 96 Pac. 833.

Actual possession for twenty years by mortgagee, or adverse possession by a stranger to the mortgage, without account or acknowledgement of any subsisting mortgage, bars the equity of redemption of the mortgagor by operation of the statute of limitations. *McNair*

v. Lot, 34 Mo. 285, 84 Am. Dec. 78.

Under *New Jersey* Rev. Stat., § 597, twenty years' possession of premises by the mortgagee, after default of payment, bars the equity of redemption; and such bar is not subject to be waived by an incautious admission of the mortgagee. *Chapin v. Wright*, 41 N. J. Eq. (13 Stew.) 438, 5 Atl. 574.

After a lapse of sixteen years from the time of a sale under a bar, known to the mortgagor or his heirs, who has remained all this time passive cannot redeem, say the court in the case of *Bergen v. Bennett*, 1 Cal. Cas. (N. Y.) 1, 2 Am. Dec. 281. See *Watson v. Mulford*, 21 N. J. L. (1 Zab.) 507; *Ten Eyck v. Craig*, 62 N. Y. 419.

Four years elapsing from the time when the right of action accrues on the mortgage debt is sufficient to bar the right of the mortgagor to maintain an action to redeem the property from the mortgage lien under the California statute. *Cunningham v. Hawkins*, 24 Cal. 413, 85 Am. Dec. 73. See *Arrington v. Liscom*, 34 Cal. 369, 94 Am. Dec. 722; *Millard v. Hathaway*, 27 Cal. 146.

In the case of *Stevens v. Dedham Sav. Inst.* 129 Mass. 547, the holder of a mortgage of land assigned it as security for his own promissory note. After a breach of the condition of the mortgage and of the assignment, the assignee brought an action to foreclose, obtained a conditional judgment for the amount due from the assignor, and on an

sumed to continue until the presumption is rebutted.²⁰ No lapse of time will serve to bar the right of redemption in those cases where the mortgage has been treated by the parties as a subsisting lien, and a security for the debt only;²¹ should the mortgagee take possession, however, and retain the same without accounting for the rents and profits for the space of twenty years, the equity of redemption will be presumed to be extinguished, or abandoned by the mortgagor; and a bill to redeem will not be entertained by a court of equity.²²

§ 1248. **By laches.**—The right of a party to redeem from a mortgage foreclosure sale under advertisement, or otherwise, may be defeated by laches.²³ Thus, where a person bringing

execution obtained seisin and possession of the land. After retaining possession for three years he sold the land. The court held that a bill by the assignor to redeem, brought within twenty years from such sale, but more than twenty years after possession was obtained, could not be maintained.

In the case of *Goodell v. Dewey*, 100 Ill. 308, a mortgagor and his wife conveyed the mortgaged premises absolutely to the mortgagee in full satisfaction of the indebtedness. The mortgagee to cut off certain intervening liens, sold under the power, immediately taking back a conveyance from the ostensible purchaser at the sale. The mortgagee surrendered notes and mortgage, and held possession for three years, the premises being worth but little more than the amount of the mortgage. During this time the mortgagor made no objection, and there was no evidence of fraud or overreaching. The court held that the mortgagor could not maintain a suit to redeem.

²⁰ *Ayers v. Waite*, 64 Mass. (10 Cush.) 72; *Shields v. Lozeau*, 34 N. J. L. (5 Vr.) 496, 3 Am. Rep. 256; *Anderson v. Lanterman*, 27 Ohio St. 104; *Steadman v. Gassett*, 18 Vt. 346; *Edwards v. Wray*, 12 Fed. 42; *Landers v. Sanders*, L. R. 19 Ch. Div. 373, 44 L. T. N. S. 171; *Clowes v. Hughes*, L. R. 5 Exch. 160; *Ord v. Heming*, 1 Vern. 418.

²¹ *Dexter v. Arnold*, 1 Sumn. C. C. 117.

²² *Dexter v. Arnold*, 1 Sumn. C. C. 117.

²³ *Bancroft v. Swain*, 143 Mass. 144, 9 N. E. 539; *Emmons v. Van Zee*, 78 Mich. 171, 43 N. W. 1100; *Hall v. Westcott*, 17 R. I. 504, 23 Atl. 25; *Francis v. Parks*, 55 Vt. 80; *Gray as adm'r etc. v. Hayhurst*, 157 Ill. App. 488; *Baird v. Baird*, 48 Colo. 506, 111 Pac. 79; *Mason v. Stevens*, 91 Ill. App. 623. See *MacGregor v. Pierce*, 17 S. D. 51, 95 N. W. 281. See also *Snipes v. Kelleher as adm'r etc.* 31 Wash. 386, 72 Pac. 67; *Dispeau v. First National Bank*, 24 R. I. 508, 53 Atl. 868; *Baker v. Bailey*, 204

a bill to redeem delays to prosecute the same for a period of more than two years after its commencement, he will be debarred by such delay from the right to redeem;²⁴ and it has been said that one who, through his own carelessness, fails to know when he must redeem, is not entitled to relief in equity.²⁵ But it has been said that a suit by a mortgagee to enforce his right to redeem the land in possession of another mortgagee, who has purchased it at a tax sale, is not to be defeated on the ground of laches, where the defendant had been in possession but six and a half years when the suit was begun;²⁶ and where a sale under a power in a trust deed was of a character wholly unauthorized, and merely amounted to a private sale, though public in form, the doctrine of laches has no application to the right to redeem.²⁷

§ 1249. **By statute of limitations.**—Uninterrupted possession by the mortgagee, or those claiming under him, without any account or acknowledgment of the mortgage for more than twenty years, except where the mortgagor, or those in privity to him, is under a disability,²⁸ bars the equity of redemption.²⁹ The supreme court of Ohio, in the case of Clark

Pa. 524, 54 Atl. 326; *Chace v. Morse as adm'r etc.* 189 Mass. 559, 76 N. E. 142; *Tetrault v. Fournier*, 187 Mass. 58, 72 N. E. 351; *Broaddus' Heirs v. Potts*, 140 Ky. 583, 131 S. W. 510; *Cooney v. Coppock*, 119 Iowa 486, 93 N. W. 495; *Adams v. Holden*, 111 Iowa, 54, 82 N. W. 468; *Sinclair v. Gunzenhauser*, 98 N. E. 37 (Ind.); *Mann v. Jobusch*, 70 Ill. App. 440; *Deadman v. Yantis*, 230 Ill. 243, 120 Am. St. Rep. 291, 82 N. E. 592; *Walker v. Warner*, 179 Ill. 16, 70 Am. St. Rep. 85, 53 N. E. 594; *Eastman v. Littlefield*, 164 Ill. 142, 45 N. E. 137; *Elrod v. Smith*, 130 Ala. 212, 30 So. 420.

In *Mississippi* the doctrine of

laches is not recognized. *Houston v. National Mutual Building & Loan Ass'c.* 80 Miss. 31, 92 Am. St. Rep. 565, 31 So. 540. See *Cox v. American Freehold & Land Mortgage Co.* 88 Miss. 88, 40 So. 739.

²⁴ *Bancroft v. Swain*, 143 Mass. 144, 9 N. E. 539.

²⁵ *Francis v. Parks*, 55 Vt. 80. See *Fitch v. Miller*, 200 Ill. 170, 65 N. E. 650.

²⁶ *Hall v. Westcott*, 17 R. I. 504, 23 Atl. 25.

²⁷ *Williamson v. Stone*, 27 Ill. App. 214, aff'd 128 Ill. 129, 22 N. E. 1005.

²⁸ See *post*, § 1251.

²⁹ *Demarest v. Wynkoop*, 3 John.

v. Potter,³⁰ say that where the mortgaged premises are an entire tract, as a farm, part of which only is improved, with a tenement thereon, and the possession to the whole is so far adverse as to create a cause of action in favor of the mortgagor, and cause time to commence running against the right to redeem, the temporary interruption of actual residence on the land, caused by the unlawful and violent acts of strangers in tearing down the house and rendering the premises untenable for the time being, will not prevent the statute from continuing to run where there is no adverse entry or offer to redeem, and the mortgagee does not abandon his possession and control, but continues to exercise all acts of ownership and dominion³¹ over the premises of which the nature of the land and its condition will admit.

§ 1250. Same.—When statute begins to run.—The statute of limitations begins to run from the time when the mortgagee, or those in privity claiming under him, takes actual, open and notorious possession of the premises. Where there is a foreclosure in due and legal form, the statute of limitations will begin to run from the time of the confirmation of the sale under the judgment or decree;³² but where time is given

Ch. (N. Y.) 129, 8 Am. Dec. 467. See *Moore v. Cable*, 1 John. Ch. (N. Y.) 385; *Clark v. Potter*, 32 Ohio St. 49; *Aggar v. Rickerell*, 3 Atk. 325; Anonymous, 3 Atk. 313; *Barron v. Martin*, 1 Coop. Eq. 189; *Reeks v. Postlewaite*, 1 Coop. Eq. 161; *Belch v. Harvey*, 2 Pr. Wms. 287n; *Bonney v. Rigard*, 19 Ves. 99; *Hodle v. Halcy*, 1 Ves. & B. 536.

In *Alabama*, the time is ten years. *Dixon v. Hayes*, 55 So. 164 (Ala.)

³⁰ 32 Ohio St. 49.

³¹ *Knowlton v. Walker*, 13 Wis. 275. See *Warder v. Enslen*, 73 Cal.

291; *Frink v. Le Roy*, 49 Cal. 314; *Crawford v. Taylor*, 42 Iowa, 260; *Green v. Turner*, 38 Iowa, 118; *Montgomery v. Chadwick*, 7 Iowa, 113; *Bird v. Keller*, 77 Me. 270; *Anding v. Davis*, 38 Miss. 574, 77 Am. Dec. 658; *Kohlheim v. Harrison*, 34 Miss. 457; *Hubbell v. Sibbey*, 50 N. Y. 468; *Miner v. Beckman*, 14 Abb. (N. Y.) Pr. N. S. 1; *Bailey v. Carter*, 7 Ired. (N. C.) Eq. 282; *Waldo v. Rice*, 14 Wis. 276; *Babcock v. Wyman*, 60 U. S. (19 How.) 289, 15 L. ed. 644.

³² For running a statute where foreclosure was void, see *Rigney v. DeGraw*, 100 Fed. 213 (Mo.)

after the sale in which to redeem, the relation of mortgagor and mortgagee will continue until the expiration of such time, and the statute of limitations will not begin to run until after the date fixed on which redemption may be made.³³

§ 1251. **Same—Disability.**—In those cases where the defendant is under any of the disabilities recognized by law at the time the statute would otherwise begin to run, the statute of limitations will not run. These disabilities are, among others, absence from the state,³⁴ coverture,³⁵ infancy,³⁶ insanity,³⁷ imprisonment,³⁸ public war,³⁹ and sometimes

³³ *Rockwell v. Servant*, 63 Ill. 429. See also *Catlin v. Murray*, 37 Wash. 164, 79 Pac. 605; *Hunter, as ex'r, etc. v. Coffman*, 74 Kan. 308, 86 Pac. 451.

³⁴ *Clinton Co. v. Cox*, 37 Iowa, 570; *Waterson v. Kirkwood*, 19 Kan. 9; *Phillips v. Sinclair*, 20 Me. 269; *Whalley v. Eldridge*, 24 Minn. 358; *Parsons v. Noggle*, 23 Minn. 328; *Beckford v. Wade*, 17 Ves. 87, 11 Rev. Rep. 20.

³⁵ *Traders Insurance Co. v. New-man*, 120 Ind. 554, 22 N. E. 428; *Barr v. Van Alstine*, 120 Ind. 139, 22 N. E. 965; *Eager v. Commonwealth*, 4 Mass. 182; *Acker v. Acker*, 81 N. Y. 143; *Demarest v. Wynkoop*, 3 John. Ch. (N. Y.) 129, 8 Am. Dec. 467.

³⁶ *Hanford v. Finch*, 41 Conn. 483; *Hertle v. McDonald*, 2 Md. Ch. 128; *Anding v. Davis*, 38 Miss. 574, 77 Am. Dec. 658; *Wells v. Morse*, 11 Vt. 9; *Snazely v. Pickle*, 29 Gratt. (Va.) 39; *Fitzhugh v. Anderson*, 2 Hen. & M. (Va.) 289, 3 Am. Dec. 625; *Parsons v. McCracken*, 9 Leigh (Va.) 495; *Belch v. Harvey*, 3 Pr. Wms. 287n; *Proctor v. Cowper*, 2 Vern. 377. See *Fearn v. Shirley*, 31 Miss. 301, 66

Am. Dec. 575; *Beacon v. Gray*, 23 Miss. 140; *Rainey v. McQueen*, 121 Ala. 191, 25 So. 920. See *Messinger v. Foster*, 115 App. Div. 689, 101 N. Y. Supp. 387 (Code Civ. Proc. § 396). But see *Walker v. Chessman*, 75 N. H. 20, 70 Atl. 248.

³⁷ *Currier v. Gale*, 85 Mass. (3 Allen) 328; *Allis v. Moore*, 84 Mass. (2 Allen) 306. See *Messinger v. Foster*, 115 App. Div. 689, 101 N. Y. Supp. 387 (Code Civ. Proc. § 396).

³⁸ *Messinger v. Foster*, 115 App. Div. 689, 101 N. Y. Supp. 387 (Code Civ. Proc. § 396).

³⁹ *Hall v. Dencklay*, 38 Ark. 506; *Reynolds v. Baker*, 6 Coldw. (Tenn.) 221; *Conrad v. Waples*, 96 U. S. 279, 305, 24 L. ed. 721, 728; *Lassere v. Rochereau*, 84 U. S. (17 Wall.) 437, 21 L. ed. 694; *Dean v. Nelson*, 77 U. S. (10 Wall.) 158, 19 L. ed. 926; *Montgomery v. United States*, 28 U. S. (15 Wall.) 395, 21 L. ed. 97. See *Washington University of Missouri v. Finch*, 85 U. S. (18 Wall.) 106, 21 L. ed. 818; *Ludlow v. Ramsey*, 78 U. S. (11 Wall.) 581, 20 L. ed. 216.

Mr. Justice Swain holds in the

fraud.⁴⁰ A party can only avail himself of those disabilities existing when the right of action first accrued, and for that reason cannot take advantage of successive disabilities which are not regarded in the construction of the statute of limitations.⁴¹ The general rule is that when the statute has begun to run it will continue to run without being impeded by any subsequent disability.⁴² Thus if the owner of the equity of redemption

case of *Lassere v. Rochereau*, 84 U. S. (17 Wall.) 437, 21 L. ed. 694, that it is contrary to the plainest principles on reason and justice, that any one should be condemned as to person or property without an opportunity to be heard. Where defendants were within the Confederate lines at the time of proceedings to foreclose a mortgage, and it was unlawful for them to cross those lines, a notice directed to them and published in a newspaper was a mere idle form, as to them, and the proceedings were wholly void and inoperative.

⁴⁰ *Demarest v. Wynkoop*, 3 John. Ch. (N. Y.) 129, 8 Am. Dec. 467; *Marks v. Pell*, 1 John Ch. (N. Y.) 594. See *Hunt's Heirs v. Ellison's Heirs*, 32 Ala. 173; *George v. Gardner*, 49 Ga. 441; *Wilson v. Robertson*, 21 N. Y. 587; *Marks v. Pell*, 1 John. Ch. (N. Y.) 594; *Reynolds v. Baker*, 6 Coldw. (Tenn.) 221; *Guinn v. Locke*, 1 Head. (Tenn.) 110; *Kinsman v. Rouse*, L. R. 17 Ch. Div. 104.

The supreme court of Alabama say, in the case of *Hunt's Heirs v. Ellison's Heirs*, *supra*, that an application to the chancery court to set aside a decree and foreclosure on account of fraud and irregularities, must be made within a reasonable time, and that an application after thirteen years had elapsed,

and the land had greatly increased in value, had passed into the hands of subsequent purchasers who had erected valuable improvements thereon, was not within a reasonable time.

⁴¹ *Demarest v. Wynkoop*, 3 John. Ch. (N. Y.) 129, 8 Am. Dec. 467.

⁴² *Currier v. Gale*, 85 Mass. (3 Allen) 328; *Demarest v. Wynkoop*, 3 John. Ch. (N. Y.) 129, 8 Am. Dec. 467; *Davis v. Indiana*, 94 U. S. 792, 24 L. ed. 320. See *Keil v. Healey*, 84 Ill. 104; *Stephens v. McCormick*, 5 Bush (Ky.) 181; *Ruff v. Bull*, 7 Harr. & J. (Md.) 14; *Allis v. Moore*, 84 Mass. (2 Allen) 306; *DeMill v. Moffatt*, 49 Mich. 130; *Bryd v. Bryd*, 28 Miss. 144; *Pinckney v. Burrage*, 31 N. J. L. (2 Vr.) 21; *Becker v. Van Valkenburgh*, 29 Barb. (N. Y.) 324; *Peck v. Randall*, 1 John. (N. Y.) 165; *Seawell v. Bunch*, 6 Jones (N. C.) L. 197; *Reimer v. Stuber*, 20 Pa. St. 458, 59 Am. Dec. 744; *Dillard v. Philson*, 5 Strob. (S. C.) L. 213; *Tracey v. Atherton*, 36 Vt. 503; *Hogan v. Kurtz*, 94 U. S. 773, 24 L. ed. 317; *Mercer v. Selden*, 42 U. S. (1 How.) 37, 11 L. ed. 38; *Walden v. Gratz*, 14 U. S. (1 Wheat.) 292, 4 L. ed. 94; *Lewis v. Barksdale*, 2 Brock. C. C. 436; *Rhodes v. Smethurst*, 4 Mees. & W. 42, 6 Id. 351; *Cotterell v. Dutton*, 4 Taunt. 826.

becomes insane or falls under any other of the disabilities before mentioned, with the possible exception of public war, after the statute begins to run, such disability will not prevent a bar.⁴³ The reason for this is that the rule is intended to save the rights of the party until all the disabilities, existing at the time the right accrues, are removed. Further than this it has never been extended.⁴⁴ When the statute of limitations begins to run it continues to run and overrides all disabilities subsequently arising.⁴⁵

§ 1252. By adverse possession.—Adverse possession of the mortgaged premises may bar the equity of redemption.⁴⁶ Thus actual possession for the period required by the statute of limitations by the mortgagee, or adverse possession by a stranger to the mortgage, without accounting, or acknowledgment of any subsisting mortgage, bars the equity of redemption of the mortgagor by operation of the statute of limitations.⁴⁷ Thus where a mortgagor allows the mortgagee or those claim-

⁴³ *Currier v. Gale*, 85 Mass. (3 Allen) 328; *Allis v. Moore*, 84 Mass. (2 Allen) 306.

⁴⁴ *Demarest v. Wynkoop*, 3 John. Ch. (N. Y.) 129, 8 Am. Dec. 467; *McFarland v. Stone*, 17 Vt. 175, 44 Am. Dec. 328.

⁴⁵ *Denn v. Richards*, 15 N. J. L. (3 J. S. Gr.) 347; *Demarest v. Wynkoop*, 3 John. Ch. (N. Y.) 129, 8 Am. Dec. 467; *Harris v. McGovern*, 2 Sawy. C. C. 513; *Denn v. Moore*, 3 Wall. Jr. C. C. 292; *Doe ex. d. Duroure v. Jones*, 4 Dunf. & E. (4 T. R.) 300, 2 Rev. Rep. 390; *Fleming v. Griswold*, 3 Hill, 85.

⁴⁶ *McNair v. Lot*, 34 Mo. 285, 84 Am. Dec. 78; *Demarest v. Wynkoop*, 3 John. Ch. (N. Y.) 129, 135, 8 Am. Dec. 467; *Elmendorf v. Taylor*, 23 U. S. (10 Wheat.) 152, 6 L. ed. 289; *Cholmondeley v. Clinton*, 2

Jac. & W. 187. See *Becker v. McCrea*, 193 N. Y. 423, 23 L.R.A. (N.S.) 754, 86 N. E. 463.

⁴⁷ *McNair v. Lot*, 34 Mo. 285, 84 Am. Dec. 78. See *Parker v. Prewitz*, 64 Ala. 555; *Goodman v. Winter*, 64 Ala. 431, 38 Am. Rep. 13; *Barksdale v. Garrett*, 64 Ala. 281, 38 Am. Rep. 6; *McCoy v. Morrow*, 18 Ill. 519, 68 Am. Dec. 578; *Stump v. Henry*, 6 Md. 201, 61 Am. Dec. 300; *Ford v. Wilson*, 35 Miss. 40, 72 Am. Dec. 137; *Cape Girardeau Co. v. Harbison*, 58 Mo. 90, 96; *Martin v. Jackson*, 27 Pa. St. 504, 67 Am. Dec. 489; *Dixon v. Hayes*, 55 So. 164 (Ala.) See *Garrett v. Ellis*, 52 So. 451 (Miss.)

Possession by the mortgagee for the time designated in the statute of limitations of a particular state, and a refusal on his part to recog-

ing under him to hold possession of the mortgaged premises for twenty years or more without accounting and are without admitting that the possession is that of a mortgaged title only, bars the equity of redemption, and the title of the mortgagee or parties in privy becomes absolute in equity, as in law.⁴⁸

In New York, under the Code of Civil Procedure,⁴⁹ an action to redeem real property from a mortgage, with or with-

nize the mortgage or any equitable claim of the mortgagor, where the mortgagor is under no disability, will have the effect to bar the equity of redemption of the mortgagor. *Davidson v. Lawrence*, 49 Ga. 340; *Locke v. Caldwell*, 91 Ill. 419; *Howland v. Shurtleff*, 43 Mass. (2 Met.) 26, 35 Am. Dec. 384; *Cape Girardeau v. Harbison*, 58 Mo. 90, 96; *McNair v. Lott*, 34 Mo. 285, 84 Am. Dec. 78; *Chapin v. Wright*, 41 N. J. Eq. (14 Stew.) 438, 5 Atl. 574; *Calkins v. Calkins*, 30 Barb. (N. Y.) 307; *Demarest v. Wynkoop*, 3 John. Ch. (N. Y.) 129, 135, 8 Am. Dec. 467; *Moore v. Cable*, 1 John. Ch. (N. Y.) 385; *Slee v. Manhattan Co.* 1 Paige Ch. (N. Y.) 48; *Ross v. Norval*, 1 Wash. (Va.) 17, 1 Am. Dec. 422; *Elmendorf v. Taylor*, 23 U. S. (10 Wheat.) 152, 170, 6 L. ed. 295; *Hughes v. Edwards*, 22 U. S. (9 Wheat.) 489, 6 L. ed. 142; *Dexter v. Arnold*, 1 Sumn. C. C. 109; *Blake v. Foster*, 2 Ball & B. 402, 457; *Barron v. Martin*, 19 Ves. 327, 3 Bro. Ch. 243.

The question of adverse possession depends on the intention of the possessor and the knowledge or means thereof on the part of the owner of the equity of redemption, and is always a question of fact to

be determined by the jury. *Ford v. Wilson*, 35 Miss. 490, 72 Am. Dec. 137.

⁴⁸ *Dawson v. Hoyle*, 58 Ala. 44; *Clark v. Cluff*, 65 N. H. 43; *Clark v. Potter*, 32 Ohio St. 42. See also *Becker v. McCrea*, 193 N. Y. 423, 23 L.R.A. (N.S.) 754, 86 N. E. 463.

If a mortgagee, with knowledge and acquiescence of the mortgagor, takes actual, open, and notorious possession of the mortgaged premises, and holds and controls the same, adversely to the rights of the mortgagor to redeem, for twenty-one years, under color of title derived from the mortgage, and from a decree of foreclosure and sale of the same to him, the equity of redemption is barred, although the decree foreclosing the mortgage was null and void. *Clark v. Potter*, 32 Ohio St. 49.

Where the possession of a mortgagee and one to whom he conveyed absolutely has continued for more than twenty years, without interruption or claim from the mortgagor or his heirs, a sale of the property and conveyance under the mortgage, or almost anything else necessary to give repose to the title of the purchaser, will be presumed. *Dawson v. Hoyle*, 58 Ala. 44.

⁴⁹ § 379.

out an account of rents and profits, may be maintained by the mortgagor or those claiming under him, against the mortgagee in possession, or those claiming under him, unless there has been adverse possession of the mortgaged premises for twenty years after the breach of a condition of the mortgage, or the non-fulfilment of a covenant therein contained.⁵⁰

§ 1253. By purchase by mortgagee.—The supreme court of Arkansas, in the case of *Moore v. Anders*,⁵¹ say that the mortgagor's equity of redemption is not barred by a purchase of the mortgaged premises made by a holder of the mortgage debt; but where the mortgagee or the purchaser of the mortgage debt, on default takes possession of the mortgaged premises and holds the same for the space of twenty years without paying interest, or in any other way accounting for said possession, and there is no circumstance appearing to justify the neglect, the mortgagor's right of redemption will be barred.⁵²

§ 1254. Tender does not revive.—In those cases where the right of the owner of the equity of redemption to redeem has been barred by the running of the statute of limitations, such right will not be revived by a subsequent tender of the amount due on the mortgage, and a demand of the possession of the premises.⁵³

§ 1255. Waiver.—The extinction by the running of the statute of limitations of the right of the mortgagor, or those claiming under him, to redeem, may be waived by an act of

⁵⁰ *Becker v. McCrea*, 193 N. Y. 423, 23 L.R.A.(N.S.) 754, 86 N. E. 463.

⁵¹ 14 Ark. 628, 60 Am. Dec. 551.

⁵² *Brobst v. Brock*, 77 U. S. (10 Wall.) 519; sub nom *Doe ex. d. Brobst v. Roc*, 19 L. ed. 1002; *Slicer v. Pittsburgh*, 57 U. S. (16

How.) 571, 14 L. ed. 1063; *Hughes v. Edwards*, 22 U. S. (9 Wheat.) 489, 6 L. ed. 142. See *ante*, § 1252.

⁵³ *Cunningham v. Hawkins*, 24 Cal. 403, 85 Am. Dec. 73; *Miner v. Beckman*, 11 Abb. (N. Y.) Pr. N. S. 147, 42 How. (N. Y.) Pr. 33.

the mortgagee, or the owner of the mortgage, which indicates a disclaimer of the foreclosure, and presumptively leaves the mortgage subject to redemption in equity; such as bringing suit and obtaining a judgment on the original debt,⁵⁴ or doing any other act which shows that the party treats the debt as still due, and the account as still open;⁵⁵ and the extinguishment of the mortgagor's equity effected by judicial action, is still subject to be waived by an admission on the part of the mortgagee, or the party holding the equity of redemption.⁵⁶

§ 1256. **Same—By acknowledgment.**—Any acknowledgment on the part of the mortgagee, or those in privity with him, of the right of the mortgagor to redeem, will prevent the running of the statute of limitations and the bar of redemption,⁵⁷ such as an admission of the existence of the debt, whether oral or in writing;⁵⁸ an assignment of the mortgage as

⁵⁴ *Hazard v. Robinson*, 15 R. I. 226, 2 Atl. 433.

⁵⁵ *Bissell v. Boseman*, 2 Dev. (N. C.) 154, 166. See *McEwen v. Welclys*, 1 Root (Conn.) 202, 1 Am. Dec. 39; *Strong v. Strong*, 2 Aik. (Vt.) 373.

⁵⁶ *Chapin v. Wright*, 41 N. J. Eq. (14 Stew.) 438, 5 Atl. 574.

⁵⁷ *Chapin v. Wright*, 41 N. J. Eq. (14 Stew.) 438, 5 Atl. 574; *Robinson v. Fife*, 3 Ohio St. 562; *Waldo v. Rice*, 14 Wis. 290; *Slicer v. Bank of Pittsburg*, 57 U. S. (16 How.) 572, 579, 14 L. ed. 1063, 1066; *Dexter v. Arnold*, 1 Sumn. C. C. 109.

If a mortgagee in possession shall, after the equity of the mortgagor has become barred by lapse of time, admit, either by word or act, that his mortgage is still a subsisting lien, the bar previously existing will be considered to have been waived, and the equity of the mortgagor

revived. *Chapin v. Wright*, 41 N. J. Eq. (14 Stew.) 438, 5 Atl. 574.

⁵⁸ *Wells v. Harter*, 56 Cal. 342; *Kerndt v. Porterfield*, 56 Iowa, 412, 9 N. W. 322; *Schmucker v. Sibert*, 18 Kan. 104, 26 Am. Rep. 765; *Southard v. Pope*, 9 B. Mon. (Ky.) 261; *Hall v. Felton*, 105 Mass. 516; *Lyon v. McDonald*, 51 Mich. 435, 16 N. W. 800; *Murphy v. Coates*, 33 N. J. Eq. (6 Stew.) 424; *Mosely v. Crockett*, 9 Rich. (S. C.) Eq. 339; *Haywood v. Ensley*, 8 Humph. (Tenn.) 460; *Snively v. Pickle*, 29 Gratt. (Va.) 27.

Parol admissions by mortgagee effect his estoppel to deny mortgagor's right to redeem. *Hough v. Bailey*, 32 Conn. 288; *Fenwick v. Macey*, 1 Dana (Ky.) 276; *Marks v. Pell*, 1 John. Ch. (N. Y.) 594; *Shepperd v. Murdock*, 3 Murph. (N. C.) 218; *Walthol v. Johnson*, 2 Call (Va.) 275; *Dexter v. Arnold*, 3 Sumn. C. C. 160; *Perry v. Mars-*

security for a debt owing from a mortgagee in possession;⁵⁹ bringing an action to foreclose the mortgage;⁶⁰ or filing an answer in equity;⁶¹ devise by will;⁶² letters written containing admissions of the existence of the mortgage and of the rights of the mortgagor;⁶³ recitals in a deed;⁶⁴ in a mortgage;⁶⁵ or rendering an account of the amount due on the mortgage debt.⁶⁶

ton, 2 Bro. C. C. 397; *Reeks v. Posthethwaite*, 1 Coop. Eq. 161; *Whiting v. White*, 1 Coop. Eq. 1; *Rayner v. Oastler*, 6 Madd. 274.

⁵⁹ *Borst v. Boyd*, 3 Sandf. Ch. (N. Y.) 501.

⁶⁰ *Calkins v. Calkins*, 3 Barb. (N. Y.) 305; *Robinson v. Fife*, 3 Ohio St. 551; *Conway v. Shrimpton*, 5 Bro. P. C. 187. See *Clark v. Potter*, 32 Ohio St. 49, 60; *Fox v. Reeder*, 28 Ohio St. 181, 189, 22 Am. Rep. 370.

⁶¹ See *Stump v. Henry*, 6 Md. 201, 61 Am. Dec. 300; *Durken v. Cleveland*, 4 Ala. 227; *Rankin v. Maxwell*, 2 A. K. Marsh (Ky.) 491; 12 Am. Dec. 431; *Belden v. Davies*, 2 Hall (N. Y.) 444; *Erskine v. North*, 14 Gratt. (Va.) 60; *Dexter v. Arnold*, 1 Sumn. C. C. 109, 3 Sumn. C. C. 152; *Goode v. Job*, 1

El. & El. 6, 102 Eng. C. L. 4; *Hodley v. Healey*, 6 Madd. 181.

⁶² *Kohlheim v. Harrison*, 34 Miss. 457; *Ord v. Smith*, 2 Eq. Cas. Abbr. 600; *Lake v. Thomas*, 3 Ves. 17.

⁶³ *Stanfield v. Hobson*, 10 Beav. 236; *Vernon v. Bethell*, 2 Eden, 110; *Thompson v. Bowyer*, 9 Jur. N. S. 863; *Cutler v. Cremer*, 1 L. J. Ch. 108; *Trulock v. Rubey*, 12 Sim. 402.

⁶⁴ *Biddell v. Brizzolara*, 56 Cal. 374, 64 Cal. 354; *Cape Girardeau Co. v. Harbison*, 58 Mo. 90; *Jayne v. Hughes*, 10 Exch. 430; *Lucas v. Dennison*, 7 Jur. 1122; *Carew v. Johnson*, 2 Sch. & L. 280; *Hansard v. Hardy*, 18 Ves. 455.

⁶⁵ *Palmer v. Butler*, 36 Iowa, 576.

⁶⁶ *Anonymous*, 2 Ark. 333; *Barron v. Martin*, 19 Ves. 327; *Edsdell v. Buchanan*, 2 Ves. Jr. 84.

APPENDIX OF FORMS.

No. 1.

General Complaint in Foreclosure by Action.

[*Title of action containing*
names of all the parties]. }

The complaint of the plaintiff in the above entitled action respectfully shows to this court (upon information and belief) :

That the defendant, C. D., for the purpose of securing the payment to E. F., his certain attorney, executors, administrators or assigns, of the sum of dollars, with interest thereon, on or about the day of , 19 , executed and delivered to the said E. F. a bond bearing date on that day, sealed with his seal, whereby the said C. D., did bind himself, his heirs, executors and administrators, in the penal sum of dollars, upon condition that the same should be void, if the said C. D., his heirs, executors or administrators should pay to the said E. F., his certain attorney, executors, administrators or assigns, the sum of money first above mentioned, as follows: [*Insert conditions of the bond verbatim, if possible*].

That it was therein expressly agreed,¹ that should any default be made in the payment of the principal or interest, or of any part of the said principal or interest, when the same should become due and payable, according to the conditions of said bond, as above expressed, and should the same remain unpaid for the space of days after the same had become due and payable, then the said moneys, principal and interest, at the option of the said obligee, his executors, administrators or assigns, should be-

¹ Insert in case bond and mortgage contain an interest clause.

come and be due and payable immediately thereupon, any other provision in said bond to the contrary notwithstanding.

That the said obligor,² in and by said bond, did covenant for himself, his heirs, executors and administrators, that the buildings erected and to be erected on the mortgaged premises, described in the mortgage given as collateral to said bond and bearing even date therewith, should be kept insured against loss or damage by fire, in a sum not less than dollars, and that the policy therefor should be assigned to said obligee, his executors, administrators or assigns, and that upon any default thereof, the said obligee, his executors, administrators or assigns, were thereby authorized to insure the same, and to add the sums paid therefor to the moneys then due, or first to become due, upon said bond, and that they should be payable on demand, with interest from the time of such payment, and should also be a lien on said premises secured by said mortgage, and added to the sums otherwise secured thereby; and also that in case the taxes,³ which might thereafter be assessed, taxed or levied against said mortgaged premises, were at any time allowed to remain unpaid for days after the said taxes had become due and payable, then the said obligee, his executors, administrators or assigns, might pay the same, and the sum so paid should also be a lien on said mortgaged premises and be added to the sums thereby secured and payable on demand, with interest.

That, as a collateral security for the payment of said indebtedness, the said defendants, C. D., and M. D., his wife, on the same day executed, duly acknowledged and delivered to the said E. F., a mortgage, whereby they granted, bargained and sold to the said E. F., his heirs and assigns, the following described premises, with the appurtenances, that is to say: [*Here insert description of premises from mortgage*], which mortgage was duly recorded in the office of the clerk of the county of , on the day of , in the year 19 , at o'clock M., in book No. of mortgages, at page .

The said mortgage contained the same condition as said bond, and the further condition that if the mortgagor, his heirs or assigns, should not pay the moneys thereby secured, according to the terms thereof, then the said E. F., his executors, administrators or assigns, were empowered to sell the said mortgaged

² Insert in case the action is to recover money paid for insurance premiums.

³ Insert in case money has been paid for taxes.

premises in due form of law, and out of the moneys arising from such sale to retain the amount due for principal, interest, taxes, assesment and insurance, in and by said bond and mortgage secured to be paid, with the costs and expenses of the proceedings thereon, the surplus, if any there should be, to be returned to the said mortgagor, C. D., his heirs or assigns.

That thereafter, the said defendant, E. F., by an instrument in writing,⁴ given under his hand and seal, dated the day of 19 , and recorded in the office of the clerk of the county of , on the day of 19 , for a valuable consideration therein expressed, duly assigned said bond and mortgage to this plaintiff, H. O., who now is and has since been the owner and holder thereof, and also guaranteed to the plaintiff that the sum secured thereby would be paid when due, with interest; [or which said assignment also contains a covenant in the following words, to wit: *Set forth the covenant verbatim*].

[*If the bond and mortgage were assigned as collateral security only, such fact and the actual interest and claim of the plaintiff should be fully alleged here*].

That thereafter,⁵ the said C. D., and M. D., his wife, by their deed of conveyance, executed under their hands and seals, dated the day of , 19 , and recorded in the office of the clerk of the county of , in book No. of deeds, at page , duly conveyed the said mortgaged premises to the defendant, J. H., subject to said mortgage; that the said defendant, J. H., in and by said deed of conveyance, and by accepting the same, assumed said mortgage and covenanted and agreed to pay off and discharge the same as part of the consideration in said deed of conveyance expressed. [*Or set forth the covenant verbatim*].

And the plaintiff further shows, that the sum of dollars became due and payable by the terms of said bond and mortgage, on the day of 19 , that the same has remained unpaid for more than days thereafter, that the said plaintiff has elected and does elect that the whole sum owing upon said bond and mortgage be due and payable, and that thereby, by the provisions of said bond and mortgage, the same became due and payable before the commencement of this action.

And the plaintiff further shows, that the said defendants, C. D., and J. H., have failed to comply with the conditions of the said

⁴ Insert in case the mortgage has been assigned.

⁵ Insert in case premises have been conveyed with assumption of payment of mortgage.

bond and mortgage, by omitting to pay the sum of _____ dollars, which by the terms and conditions of said bond and mortgage became due and payable on the _____ day of _____ 19____; and also, by omitting to pay the sum of _____ dollars for insurance, as required by said bond and mortgage, which sum of _____ dollars was advanced and paid for such insurance by this plaintiff on the _____ day of _____ 19____, for the payment whereof due demand was made before the commencement of this action, the same being also a lien added to the other claims by said mortgage secured to be paid; and also, by omitting to pay the sum of _____ dollars, for taxes or assessments, taxed or assessed against the said mortgaged premises, and left unpaid for _____ days after the same became due and payable, which said sum for taxes and assessments was thereafter advanced and paid by this plaintiff on the _____ day of _____, 19____; and that the same is justly due and unpaid with interest thereon from the _____ day of _____ 19____, and is also a lien added to the other claims by said mortgage secured to be paid; and that there is now justly due to the plaintiff upon said bond and mortgage the same of _____ dollars, with interest thereon from the _____ day of _____, 19____, and the further sum of _____ dollars paid for insurance as aforesaid, with interest thereon from the _____ day of _____ 19____, and the further sum of _____ dollars paid for taxes and assessments as aforesaid, with interest thereon from the _____ day of _____ 19____, amounting in the aggregate to the sum of _____ dollars; and that there is to become due thereon the further sum of _____ dollars with interest thereon from the _____ day of _____ 19____.

And the plaintiff further shows, that the defendants, R. P. and D. O., are infants, under the age of fourteen years and reside with their parents (*or guardian*) at _____, _____; that the defendant, D. P., is an infant above the age of fourteen years, residing with _____ at _____; and that the defendant, O. S., does not reside within the state of New York, but at _____ in _____. [*State residence if known*].

And the plaintiff further shows, that no proceedings have been had at law or otherwise, and that no other action has been brought, to his knowledge or belief, for the recovery of said sum secured by said bond and mortgage, or for the recovery of the said mortgage debt or any part thereof. [*If this is not true, state what proceedings have been taken*].

And the plaintiff further shows, upon information and belief, that the defendants, C. D., M. D., J. H., R. P., X. Y. and D. P., have, or claim to have, some interest in, or lien upon, the said

mortgaged premises or some part thereof, which interest or lien, if any, has accrued subsequently to the lien of said mortgage.

[If parties with paramount liens are made defendants for the purpose of having them ascertained, such liens should be fully stated here].

Wherefore, the plaintiff demands judgment, that the defendants and all persons claiming under them, or either or any of them, subsequently to the commencement of this action, and every person, whose conveyance is subsequent or subsequently recorded, may be barred and foreclosed of all right, title, claim, lien and equity of redemption in said mortgaged premises; that the said mortgaged premises, or so much thereof as may be sufficient to raise the amount due to the plaintiff for all sums paid for insurance, taxes, or assessments, and also for principal, interest and costs, and which may be sold in parcels without material injury to the parties, may be decreed to be sold according to law; that out of all the moneys arising from the sale thereof, the plaintiff may be paid the amount due on said bond and mortgage with interest to the time of such payment, and the costs and expenses of this action, so far as the amount of such moneys properly applicable thereto will pay the same; that the officer making such sale be directed to pay from the proceeds thereof, all taxes, assessments, and water rates, which are liens on the property sold; that the defendants, C. D., E. F. and J. H., may be adjudged to pay any deficiency which may remain after applying of all said moneys so applicable thereto; and that the plaintiff may have such other or further relief, or both in the premises, as shall be just and equitable.

T. R.,
Plaintiff's Attorney.

[Add verification in the usual form].

No. 2.

Complaint to Foreclose Mortgage Executed by Infants Pursuant to Order of Court.

*[Title of action containing}
names of all the parties].*

The complaint of the plaintiff in the above entitled action respectfully shows to this court (upon information and belief):

Mortg. Vol. II.—105.

That a petition was heretofore presented to this court by the defendant, D. P., an infant over fourteen years of age, and by the defendants, O. P., R. P. and T. P., infants under the age of fourteen years, by the defendant, C. M. P., their mother and next friend, praying for the mortgaging of all the right, title and interest of said infants in and to the real estate hereinafter mentioned and described; and that such proceedings were afterwards had in said court upon the said petition, that an order of this court was made on the day of , 19 , whereby M. C. was appointed the special guardian of said infants for the purpose of such application, upon his giving the proper security therein required; and that such security, duly executed, justified and approved, was subsequently filed by said guardian in the proper office.

That by an order of said court in said proceedings, made on the day of , 19 , that said M. C. was authorized and empowered to contract for the mortgaging of all the right, title and interest of the said infants in the said real estate, for an amount not exceeding that specified in the referee's report, referred to in said order, and upon the terms and conditions therein mentioned, to wit: for dollars, payable in years at least, or in a longer time, at the rate of interest per annum.

That in pursuance of the last mentioned order, the said special guardian afterwards made his report to the said court, which report was dated the day of , 19 , whereby he reported that he had entered into an agreement with this plaintiff, subject to the approval of said court, for the mortgaging to said plaintiff of all the right, title and interest of said infants in and to the said real estate, upon the terms and conditions therein mentioned, to wit: providing for the execution by said guardian of a mortgage, in the name of said infants, to said plaintiff, for the amount and time and upon the terms and conditions upon which said mortgage, upon the terms and conditions provided by said mort-

That by another order of said court, made in said proceedings on the day of , 19 , it was ordered, that the said report of said special guardian and the agreement therein mentioned, be, and the same were thereby, ratified and confirmed; and that the said special guardian, in the names of said infants, execute, acknowledge and deliver to the said plaintiff, a good and sufficient mortgage, upon the terms and conditions provided by said agreement, of all the estate, right, title and interest of said infants in and to the said premises, being the free simple thereof, subject to their mother's dower interest therein, as hereinafter mentioned,

upon the said plaintiff's complying with the said terms and conditions of the said agreement by which such mortgage was to be delivered, to wit: the payment to said special guardian by him of the sum of dollars.

That the said plaintiff thereafter complied with the said terms and conditions of said agreement on his part to be performed and paid the said special guardian the sum of dollars.

That the said infants, by their said special guardian, pursuant to the several orders aforesaid, and in pursuance of the statute in such case made and provided, and in consideration of the sum of dollars, paid to their said special guardian as aforesaid, and the said C. M. P., the mother of said infants, who had a vested dower right in said premises as the widow of L. P., deceased, the father of said infants, in consideration of the sum paid to said special guardian and of one dollar to her in hand paid, as a consideration for releasing her said dower interest in said premises to said plaintiff, (the said C. M. P. thereby agreeing, in consideration aforesaid, that she would not assert or set up her dower interest in said premises as against said mortgage and against the said plaintiff, the mortgagee therein named, his executors, administrators or assigns), on the day of , 19 , as security for the payment of said principal sum of dollars, with interest thereon, as hereinafter mentioned, did execute, duly acknowledge and deliver to the said plaintiff a mortgage, whereby they granted, bargained and sold to the said plaintiff the following described premises, with the appurtenances, that is to say: [*Here insert description of premises from mortgage*], upon the express condition, that if the said parties of the first part should well and truly pay unto the said party of the second part, his executors, administrators, or assigns, the sum of dollars in

 years from the date of said mortgage, with interest thereon at the rate of per centum per annum, payable semi-annually from the date thereof, and should keep the buildings erected, or thereafter to be erected upon said premises, insured in some solvent incorporated fire insurance company of this state, against loss of damage by fire in the sum of at least dollars, and should assign and deliver the policy or policies of such insurance, and the receipts or certificates of renewal thereof, to the said party of the second part, his executors, administrators, or assigns, so and in such manner and form that they should at all time and times, until the full payment of the said money, have and hold said policies as a collateral and full security for the payment of all money due or to become due upon said mortgage, and should

during all the time, until the said moneys secured by said mortgage should be fully paid and satisfied, pay and discharge, immediately after they should become due or payable, all taxes, water rates, assessments, or other charges which might be levied, laid, or assessed upon the above described premises or any part thereof; then the said mortgage and the estate thereby granted, should cease, determine and become null and void.

And the plaintiff further shows, that the said mortgage was duly recorded in the office of the clerk of the county of _____, on the _____ day of _____, 19____, _____ o'clock _____ M., in Book No. _____ of mortgages, at page _____.

[Adapt the remainder of this form from Form No. 1.]

No. 3.

Complaint to Foreclose Savings and Loan Association Mortgage.

[Title of action containing}
names of all the parties].}

The plaintiff in the above entitled action complains of the defendants therein, and states to the court (upon information and belief) :

That the plaintiff is a domestic corporation, located at _____, and duly constituted, organized and incorporated in pursuance of an act entitled, "An Act for the Incorporation of Building, Mutual Loan and Accumulating Fund Associations," passed April 10th, 1851, and of the act or acts supplementary thereto, and amendatory thereof; that the defendant, C. D., on or about the _____ day of _____, 19____, executed under his hand and seal, and delivered to this plaintiff, a bond, dated on that day, in the penal sum of _____ dollars, with the conditions therein written in substance, that if the said obligor in said bond named, would pay or caused to be paid to the _____ association or to its successor or assigns, the sum of _____ dollars in manner following, that is to say: the sum of _____ dollars and _____ cents contribution or principal, and _____ dollars and _____ cents interest on shares of the capital stock of said association, each and every week from the date thereof, until the dues and dividends accrued on said shares should equal the said principal sum of _____ dollars,

including premiums paid for any loan, by the consent of such holder; and also all dues, fines and penalties that might be imposed upon the said obligor, as a member of said association, pursuant to the articles, rules and regulations thereof, to be paid into the treasury of said association on each and every (day) thereafter, until the said sum of dollars has been fully paid as aforesaid, then the said bond to be void, else to remain in full force and virtue; and with the agreement also therein written, in substance, that in case any of said installments of principal or interest, or any part thereof, or any fines or penalties imposed as aforesaid, should remain unpaid for months after the same should become due, then the whole of said principal sum, together with the unpaid interest, dues, penalties, fines and assessments thereon, should become due and payable forthwith.

And to secure the payment of the principal, interest, dues, fines and premiums mentioned in the conditions of said bond, the said C. D. and M. D., his wife, did at the same time execute under their hands and seals, duly acknowledge and deliver to this plaintiff a mortgage, bearing even date with said bond, whereby they granted, bargained and sold to this principal, its successors and assigns, the following described premises, with the appurtenances, that is to say: [*Here insert description of premises from mortgage*].

That said mortgage contained the same conditions, as the said bond, and the further condition, that if said mortgagors should not pay the moneys thereby secured, according to the terms thereof, then the said plaintiff, or its successors, or assigns, were empowered to sell the mortgaged premises in due form of law, and out of the moneys arising from such sale to retain the amount then due upon said bond and mortgage, secured to be paid, together with the costs and charges of the proceedings thereon, the surplus, if any there should be, to be returned to the said C. D., his heirs and assigns, which said mortgage was duly recorded in the office of the clerk of the county of , and the day of , 19 , at o'clock M., in book No. of mortgages, at page .

That at the time of the execution and delivery of said bond and mortgage, as aforesaid, the said C. D. was, and still is, a member of said association, and is the owner of shares of the capital stock thereof; that said bond and mortgage were given, as aforesaid, to secure the indebtedness of dollars upon of such shares loaned to the said C. D.

That the capital stock of said association consists of shares of dollars each; that by the rules and regulations of said association it was provided, among other things, that the said capital stock should be payable in weekly installments of cents per share, from and including the first day of membership; and that after being awarded a loan, every member should pay to the said association, weekly, the full sum of cents interest per share on each and every share of said loan; and that every member, neglecting to pay said installments regularly, should forfeit and pay to said association cents per week as a fine for each and every share of such stock held by him, and for neglecting to pay said weekly interest, should forfeit and pay as a fine the full sum of cents per share, of the loan to him, for each and every week he should be in default of such weekly payments.

That the said C. D. failed to comply with the conditions of said bond and mortgage by omitting to pay the sum of dollars contribution or principal, and dollars interest, which became due on the day of , 19 ; that more than three months have elapsed since the same became due; that the same and all installments of principal and interest which have become due since that time, still remain unpaid; and that there remains unpaid on said bond and mortgage the sum of dollars principal, together with dollars interest, and dollars due and dollars fines, amounting in the aggregate to the sum of dollars, with interest thereon from the day of , 19 .

And the plaintiff further states (upon information and belief) that the defendants, C. D., M. D. and J. H., have, or claim to have, some interest in or lien upon said mortgaged premises, or some part thereof, which interest of lien, if any, has accrued subsequently to the lien of said mortgage.

And the plaintiff further shows, that no proceedings have been had at law or otherwise, and no action has been brought to the knowledge or belief of said plaintiff, for the recovery of said sum secured by said bond and mortgage, or for the recovery of said mortgage debt, or any part thereof. [*If not true, state what proceedings have been taken*].

Wherefore, the plaintiff demands that the defendants, and all parties claiming under them, or either or any of them, subsequently to the commencement of this action, and every person whose conveyance is subsequent or subsequently recorded, may be barred and foreclosed of all right, title, claim, lien and equity of redemption in said mortgaged premises and every part thereof; that

the said mortgaged premises, or so much thereof as may be sufficient to raise the amount due to the plaintiff for all sums paid for taxes, assessments, or insurance, and also for principal, interest, fines and costs, and which may be sold in parcels, without material injury to the parties, may be decreed to be sold according to law; that out of all the moneys arising from the sale thereof, the plaintiff may be paid the amount due on said bond and mortgage, and the said interest and fines, with the interest thereon to the time of such payment, together with the costs and expenses of this action, so far as the amount of such moneys properly applicable thereto will pay the same; that the officer making such sale be directed to pay from the proceeds thereof all taxes, assessments and water rates, which are liens upon the property sold; that the defendant, C. D., may be adjudged to pay any deficiency which may remain after applying all of said moneys so applicable thereto; and that the plaintiff may have such other or further relief, or both in the premises, as shall be just and equitable.

T. R.,
Plaintiff's Attorney.

COUNTY OF , ss.:

H. F. being duly sworn, says that he is the of the plaintiff, in the above entitled action; that the foregoing complaint is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true; that the reason why this affidavit is not made by the plaintiff is, that the plaintiff is a corporation; that deponent is an officer of said corporation, to wit: the thereof; that deponent's knowledge of the facts stated in said complaint is derived from the books and papers of said association, which are kept under the immediate supervision of deponent, and from the records of the county clerk's office.

[*Jurat*].

H. F.

No. 4.

General Form of Answer.

[*Title of the action*].

The defendant, C. D., for his answer to the complaint of the plaintiff herein, denies each and every allegation therein con-

tained, and further denies that the plaintiff is the lawful owner of the bond and mortgage mentioned in said complaint, or of either of them, or that he has any interest whatever in said bond and mortgage, or in the moneys thereby secured, or pretended to be thereby secured.

[And for a further answer and defence, this defendant alleges and states to the court, that she is, and at the time of the execution of the bond and mortgage mentioned in said complaint, was a married woman; that the said bond and mortgage were not executed for any debt or liability of this defendant, nor for any advance or loan to her, nor for any benefit or advantage to her or to her estate whatever, but were given solely as collateral security for an antecedent pretended indebtedness of her husband; that the said mortgage was given upon, and covers the sole and separate real estate of this defendant, in which her husband has no interest, and had none when said mortgage was given; that this mortgage was executed by this defendant under and by the direction, coercion, duress and threats of the plaintiff and her said husband, and was not her free and voluntary act; and this defendant, therefore, insists that the said bond and mortgage are void and of no effect, and no lien or charge upon her said real estate.]

And this defendant further answering, shows, that the loan alleged in the complaint, was made to the defendant by the plaintiff on the corrupt and unlawful agreement between them, that the plaintiff should reserve and secure to himself, and the defendant would pay to him, for the use of said sum, a greater sum than the rate of per centum per annum; to wit: the rate of per centum per annum (besides a commission of per centum on the face of said bond and mortgage).

That said sum was deducted and reserved from the amount of said bond and mortgage by said plaintiff, and the balance only paid to said defendant; that is to say, that this defendant agreed to pay, and the plaintiff agreed to receive, dollars for said loan, the plaintiff reserving and securing to himself for the loan of money on said bond and mortgage, until the maturity thereof, dollars.⁶ [*Or, state any other interest or compensation agreed on; and the payment of it, if it has been paid*].

⁶ See *Manning v. Tyler*, 21 N. Y. 567.

Wherefore, this defendant demands that the complaint in this action be dismissed with costs.

J. Z.,

Attorney for Defendant C. D.

[Office and post-office address].

[Add verification in the usual form].

No. 5.

Infant Defendant's Answer.

[Title of the action.]

The defendants R. P. and D. P., by M. N., their guardian *ad litem*, answering the complaint of the plaintiff above named, say, that they are strangers to all and singular the matters and things in said complaint contained; that these defendants are infants under the age of twenty-one years, and claim such an interest in the premises described in said complaint as they are entitled to, and submit their rights to the court for protection.

Dated, the day of , 19 .

V. O.

Attorney for Guardian ad litem.

[Office and post-office address].

No. 6.

Notice of Object of Action, with Notice of No Personal Claim.

[Title of the action].

To the above named defendant, *[name]*:

Take notice, that the summons herewith served upon you in this action, is issued upon a complaint praying for the foreclosure of a mortgage executed by C. D., and wife, to E. F., dated the day of , 19 , and recorded in the office of the clerk of the county of , in book No. of mortgages, at

page , on the day of , 19 , at o'clock M., to secure the payment of the sum of dollars, with interest thereon from the day of , 19 , (and which mortgage has been duly assigned to this plaintiff).

That there is now due and owing to this plaintiff, on said bond and mortgage, the sum of dollars, with interest thereon from the day of , 19 ; that the following is a description of the mortgaged premises: [*Insert description from mortgage.*]

That no personal claim is made against you, nor against any defendant, except against the defendants, C. D. and J. H.

Dated the day of , 19 .

T. R., *Plaintiff's Attorney.*

[*Office and post-office address.*]

No. 7.

Notice of Pendency of Action.

[*Title of the action.*]

Notice is hereby given, that an action has been commenced and is now pending in this court, upon the complaint of the above named plaintiff, against the above named defendants, for the foreclosure of a mortgage, bearing date the day of , 19 , executed by C. D., and M. D., his wife, to E. F., and recorded in the office of the clerk of the county of , at , on the day of , 19 , in book No. of mortgages, at page , at o'clock in the noon (which said mortgage has been duly assigned by said E. F., to the above named H. O., who is the plaintiff herein).

That the mortgaged premises affected by this foreclosure were, at the time of the commencement of this action, and at the time of filing this notice are, situated in the county of , and that they are described in the said mortgage as follows, to wit: [*Here insert description of premises from mortgage.*]

The clerk of the county of will please index this notice against the names of the defendants, C. D., J. H. and R. P.

Dated the day of , 19 .

T. R., *Plaintiff's Attorney.*

[*Office and post-office address.*]

No. 8.

County Clerk's Certificate of Filing Lis Pendens.

[*Title of the action*].

COUNTY OF , ss.:

I, clerk of the county of , of the court thereof, being a court of record and having a seal, do hereby certify, that I have compared the copy of the notice of pendency of action in the above entitled action hereto annexed, with the original thereof, now on file and record in my office, and that the same is a transcript thereof and of the whole of said original.

And I do hereby further certify that the said notice of pendency of action was filed and recorded in my said office, on the day of , 19 .

In witness whereof, I have hereunto set my hand and affixed the seal of my said office, this day of , 19 .

[*Seal*].

[*County Clerk*].

No. 9.

Affidavit of Filing Notice of Pendency of Action Preliminary to Judgment.

[*Title of the action*].

COUNTY OF , ss.:

O. J., being duly sworn, says that he resides in the of , in the county of , and that he is (managing clerk for T. R.), the attorney for the plaintiff in the above entitled action; that this action was brought to foreclose a mortgage upon real property situated in the county of .

That the whole sum secured by said mortgage is now due and payable, (*or*, that an installment of dollars of the principal of said mortgage, and interest thereon from the day of , 19 , is now due and payable, and that the residue

thereof, being the sum of dollars, and interest thereon from the day of , 19 , will become due and payable on the day of , 19).

That the complaint herein was filed in the office of the clerk of the county of , on the day of , 19 , and that a notice of the pendency of this action, containing the names of all the parties thereto, the object of the action, the date of the said mortgage, the names of the parties thereto, the time and place of recording the same, and a description of the mortgaged premises, and containing correctly and truly all the particulars required by law to be stated in such notice, was more than twenty days since, *viz.*: on the day of , 19 , filed and recorded in the office of the clerk of the county of , that being the county in which the mortgaged premises are situated, which filing was at or immediately after the time of filing said complaint therein as required by law, and more than twenty days since; and that since the filing of said notice the complaint in this action has not been amended by making new parties to the action, nor so as to affect other property not described in the original complaint, nor so as to extend the claims of the plaintiff as against the mortgaged premises.

That all of the defendants have been duly served with the summons, or have duly appeared herein by their respective attorneys, as will more fully appear by the affidavits of service and notices of appearance which are hereto annexed.

That none of the defendants are infants or absentees (*or*, that none of the defendants are infants, except the defendant, R. P., who has appeared by his guardian *ad litem*, and that none of the defendants are absentees, except the defendant, O. S., who has been duly served with the summons by publication thereof, under an order of this court, proof of which service is hereto annexed).

That the time to answer has expired as to all the defendants, and that no answer or demurrer has been received from any defendant (except the usual general answer of the infant defendant, D. P., who answers by his guardian, and who does not controvert any of the allegations of the complaint; and except also, the answer of the defendant, C. D., the issues raised by which have been duly tried and decided in favor of this plaintiff by Hon. L. Q., a justice of this court, whose findings are hereunto annexed).

[*Jurat*].

[*Signature*].

No. 10.

Notice of Application for Order of Reference and Judgment.

[*Title of the action*].

Take notice, that on all the papers and proceedings in this action and on the affidavits hereto annexed, copies of which are herewith served upon you, the plaintiff will apply to this court at a term thereof, to be held at the court house, in the city of , on the day of , 19 , at o'clock in the noon of that day, or as soon thereafter as counsel can be heard, for the relief demanded in the complaint; and also for an order referring this action to some suitable person to compute the amount due to the plaintiff for principal and interest on the bond and mortgage set forth in the complaint, (and also to ascertain and compute the amount due to such of the defendants as are prior incumbrancers of the mortgaged premises), [*if the whole amount secured by the mortgage has not become due, or if any of the defendants are infants or absentees, the notice of motion should follow the language of the order in Form No. 11*], and for such other and further relief as may be just.⁷

Dated the day , 19 .
T. R.,

Plaintiff's Attorney.

[*Office and post-office address*].

To. J. Z.,

Attorney for Defendant, [name].

No. 11.

Order of Reference, Preliminary to Judgment.

Present: Hon. , Judge. At a term, etc.

[*Title of the action*].

On reading the complaint on file in this action, and on reading

⁷ See *ante* §§ 524, 525.

and filing the affidavit of T. R., the attorney for the plaintiff, and the affidavits of service and the notices of appearance, from which it appears that this action was brought to foreclose a mortgage, and that the whole amount secured thereby is (not) due; and it further appearing that the summons was duly served on all of the defendants herein, more than twenty days since; that the time to answer has expired as to all of the defendants, and that no answer or demurrer has been received from any of them, and that none of the defendants are infants or absentees, (*or*, that no answer has been served by any defendant, except the usual general answer of the infant defendants, R. P. and D. P., who have appeared and answered by their guardian *ad litem*, and that the defendant O. S., is an absentee); and it further appearing that a notice of the pendency of this action was filed more than twenty days since; and on filing due notice of this motion, with due proof of the service thereof on the attorneys for all of the defendants who have appeared herein:

Now, on motion of T. R., attorney for the plaintiff, and after hearing J. Z., of counsel for the defendant C. D., it is

ORDERED, that it be referred to X. Y., Esq., a counselor at law, of _____, to ascertain and compute the amount due to the plaintiff for principal and interest on the bond and mortgage set forth in the complaint, (and also to compute the amount due to such of the defendants as are prior incumbrancers of the mortgaged premises).

[*Where the whole amount secured by the mortgage has not become due, the order should be*]: to ascertain and compute the amount due and yet to become due on the bond and mortgage set forth in the complaint, including interest thereon to the date of his report, and also to ascertain and report the situation of the mortgaged premises, and whether, in his opinion, the same can be sold in parcels, without prejudice to the interests of the parties; and if he shall be of the opinion that a sale of the whole of said premises in one parcel will be most beneficial to the parties, then that he report the same with his reasons for such opinion.

[*If one of the defendants is an infant, and has put in a general answer by his guardian ad litem, or if any of the defendants are absentees, the order should read in addition*]: to take proof of the facts and circumstances stated in the complaint, and to examine the plaintiff or his agent on oath, as to any payments which have been made, and to ascertain and compute the amount due to the plaintiff for principal and interest on the bond and mortgage set forth in the complaint.

No. 12.

Subpœna to Attend Before Referee.[*Title of the action.*]

By virtue of an order made and entered in the above entitled action, on the day of , 19 , to ascertain and compute the amount due to the plaintiff for principal and interest on the bond and mortgage set forth in the complaint [*Or, insert the substance of the order of reference, following its language*], I. X. Y., the referee appointed herein, do hereby summon you to appear before me, at my office, No. street, in the city of , on the day of , 19 , at o'clock in the noon, to attend a hearing of the matters in said action, in reference before me, as such referee, pursuant to said order. And hereof, fail not at your peril.

Dated the day of , 19 .

X. Y.,
Referee.

No. 13.

Oath of Referee.[*Title of the action.*]

COUNTY OF , ss.:

I, X. Y., the referee named in the order of this court, made in the above entitled action, at a term thereof held on the day of , 19 , by which it was referred to the undersigned referee, to ascertain and compute the amount due to the plaintiff for principal and interest on the bond and mortgage set forth in the complaint, [*following the language of the order*], being duly sworn, do depose and say:

That I will faithfully and fairly try and determine the questions referred to me, as the case requires, and that I will make a just and true report, according to the best of my understanding.

[*Jurat*][*Signature*].

No. 14.

Report of Referee, Preliminary to Judgment.

Whole Amount Due. No Infants or Absentees.

[Title of the action.]

To the court of

In pursuance of an order of this court, made in the above entitled action, on the day of , 19 , by which it was referred to the undersigned referee, to ascertain and compute the amount due to the plaintiff on the bond and mortgage set forth in the complaint in this action, [*following the language of the order.*]

I, X. Y., the referee in said order named, do report, that, having first taken the referee's oath herein as required by law, I have computed and ascertained the amount due to the plaintiff, upon and by virtue of the said bond and mortgage, and that I find and accordingly report, that there is due to the plaintiff for principal and interest on the said bond and mortgage at the date of this, my report, the sum of dollars.

Schedule "A," hereunto annexed, shows a statement of the amounts due for principal and interest respectively, the periods of the computation of interest, and its rate.

Dated the day , 19.

*[Signature of Referee].***SCHEDULE "A."**

EXHIBIT No. 1. Bond executed by C. D. to E. F., dated the day of , 19 , to secure the payment of the sum of dollars and interest.

EXHIBIT No. 2. Mortgage executed by C. D. and M. D., his wife, to E. F., to secure the payment of said bond; same date as bond; recorded the day of , 19 , in the office of the clerk of the county of , in book No. , of mortgages, at page .

EXHIBIT No. 3. [*Insert in case of assignment*]. Assignment of said bond and mortgage from E. F. to H. O., dated the day of , 19 , and recorded in the office of the clerk of the county of , in book No. , of assignments of mortgages, at page .

EXHIBIT No. 4. Policy of insurance for dollars in
the fire insurance company. Premium paid, dollars.

EXHIBIT No. 5. Tax receipts for taxes paid by plaintiff for
the year 19 , to the county (*or* city) treasurer, amounting
to dollars.

Principal sum on bond\$

Interest thereon from to , being years,
 months and days, at per centum per
annum\$

Amount paid by plaintiff for taxes\$

Interest thereon from to this date, at per centum
per annum\$

Amount paid by plaintiff for insurance\$

Interest thereon from to this date, at per centum
per annum\$

Total amount due\$

Dated the day of , 19 .

[*Signature of Referee*].

No. 15.

Report of Referee Preliminary to Judgment.

Whole Amount Not Due. No Infants or Absentees.

[*Title of the action.*]

To the court of

In pursuance of an order of this court, made in the above
entitled action, on the day of , 19 , by which it was
referred to the undersigned referee, to ascertain and compute the
amount due, and yet to become due, to the plaintiff on the bond
and mortgage set forth in the complaint, which is filed in this
action, including interest thereon to the date of this report; and
also to ascertain and report the situation of the mortgaged
premises, and whether, in his opinion, the same could be sold in
parcels, without injury to the interests of the parties, and if he
should be of the opinion that a sale of said premises in one parcel

would be most beneficial to the parties, to report his reasons for such opinion,

I, X. Y., the referee in said order named, after having first taken the referee's oath herein as required by law, do report:

That I have ascertained and computed the amount due to the plaintiff upon and by virtue of the said bond and mortgage, and that the amount so due, with interest to the date of this report, is the sum of dollars.

That I have also ascertained and computed the amount yet to become due to the plaintiff upon said bond and mortgage, and that the amount which is not yet due, but which will hereafter become due thereon, including interest to the date of this report, is the sum of dollars.

That the whole amount secured by the said bond and mortgage and still remaining unpaid, including interest thereon to the date of this report, is the sum of dollars.

Schedule "A," hereunto annexed, shows a statement of the amounts of principal due, and yet to become due, respectively; the amounts of interest thereon, the periods of computation of interest, and its rate.

I do further certify and report that I have ascertained the situation of the mortgaged premises, and am of the opinion that the same cannot, (*or can*) be sold in parcels, without injury to the interest of the parties; that my reasons for such opinion are as follows: [*Here state the reasons for such opinion*].

The testimony upon which I have formed said opinion is hereto annexed, and forms a part of this report.

Dated the day of , 19 .

[*Signature of Referee*].

SCHEDULE "A."

[*Set out the bond and mortgage and the other papers used as exhibits on the reference, as in the preceding form, and continue as follows*]:

Principal sum now due\$

Interest thereon from to , being years,
 months and days, at per centum per annum,

Amount due\$

Principal sum secured by said bond and mortgage, but
not yet due\$

Interest thereon from to , being years,
 months and days, at per centum per annum, _____

Amount to become due\$

Amount due, as above\$

Amount to become due, as above _____

Total amount of plaintiff's claim at this date...\$

Dated the day of , 19 .

[Signature of Referee].

No. 16.

Report of Referee Preliminary to Judgment.

Whole Amount Due. Infants or Absentees.

[*Title of the action.*]

To the court of :

In pursuance of an order of this court, made in the above entitled action, on the day of , 19 , by which it was referred to the undersigned referee, to take proof of the facts and circumstances stated in the complaint, and to examine the plaintiff or his agent on oath, as to any payments which have been made, and to ascertain and compute the amount due to the plaintiff for principal and interest on the bond and mortgage set forth in the complaint,

I. X. Y., the referee in said order named, do certify and report, that after having first taken the referee's oath herein, as required by law, I took proof of the facts and circumstances stated in the complaint, and examined the plaintiff (*or* U. R., his agent), on oath as to any payments which have been made, and that I am of the opinion, and accordingly do report, that the facts and circumstances stated in said complaint are true, and that no payments have been made on said bond and mortgage, except such as are duly credited in the said complaint.

The said examination of the plaintiff, (*or* of U. R., the said agent of the plaintiff), and the proofs taken by me of the facts and circumstances stated in the complaint, except such of said proofs as were documentary, are annexed to this report.

And I do further certify and report, that I have ascertained and computed the amount due to the plaintiff for principal and interest on the bond and mortgage set forth in the complaint, and that I find and accordingly do report, that there is due to the plaintiff for principal and interest on the said bond and mortgage, at the date of this my report, the sum of dollars.

Schedule "A," hereto annexed, shows a statement of the amounts due for principal and interest respectively, the periods of the computation of the interest, and its rate.

Dated the day of , 19 .

[*Signature of Referee*].

SCHEDULE "A."

[*Insert Schedule "A," as in the preceding form.*]

No. 17.

Judgment of Foreclosure and Sale.

Whole Amount Due.

At a term, *etc.*

Present: Hon. , *Judge.*

[*Title of the action*].

On reading and filing the affidavits of service of the summons herein, and the notices of appearance, showing the due service of the summons on all of the defendants in this action, and the affidavit of T. R., attorney for the plaintiff, showing that none of the defendants are infants or absentees (*or*, that none of the defendants are infants excepting the defendant R. P., and that none of the defendants are absentees excepting the defendant O. S., who has been duly served with the summons by the publication thereof pursuant to an order of this court), and that the time to answer has expired as to all of the defendants, and that no answer or demurrer has been put in by any of the defendants (excepting the general answer of the defendant R. P., who is an infant, and whose answer by his guardian *ad litem* does not controvert any of the allegations of the complaint, and excepting also the answer of the defendant C. D., the issues raised by which have been duly tried at a term of this court, before Hon. , one of the Justices thereof, and a decision therein rendered for the plaintiff and duly filed) [*If computation is by the court on the trial of the issues*], (and the court on such trial having ascertained and computed the amount due to the plaintiff for principal and interest on the bond and mortgage set

forth in the complaint to be the sum of dollars, and interest thereon from the day of , 19 , the date when said computation was made); and on reading and filing the report of X. Y., Esq., to whom it was referred, to ascertain and compute the amount due to the plaintiff, for principal and interest on the bond and mortgage set forth in the complaint (and to such of the defendants, as are prior incumbrancers of the mortgaged premises), [*If any of the defendants are infants or absentees, continue in the language of the order of reference*; and to take proof of the facts and circumstances stated in the complaint, and to examine the plaintiff, or his agent, on oath, as to any payments which have been made], by which report, bearing date the day of , 19 , it appears [*in the case of infants or absentees*], that the facts and circumstances stated in said complaint, are true, and that no payments have been made, except such as are duly credited in the said complaint, and that the sum of dollars was due thereon, at the date of said report; and on reading and filing due proof that notice of the pendency of this action was filed in the office of the clerk of the county of , on the day of , 19 .

Now, on motion of T. R., attorney for the plaintiff, no one appearing in opposition (*or*, after hearing J. Z., attorney for the defendant C. D., in opposition thereto), it is

ORDERED, that the said report be, and the same hereby is, in all things confirmed; and, on like motion as aforesaid, it is adjudged, that the mortgaged premises, described in the complaint in this action, as hereinafter set forth, or so much thereof as may be sufficient to raise the amount due to the plaintiff for principal, interest and costs, and which may be sold separately, without material injury to the parties interested, be sold at public auction, in the county of , by and under the direction of J. R., Esq., of the city of , counselor at law, who is hereby appointed a referee for that purpose, (*or* by, and under the direction of the sheriff of said county); that the said referee give public notice of the time and place of such sale, according to law and the practice of this court; that either, or any, of the parties to this action, may purchase at such sale; that the said referee execute to the purchaser, or purchasers, a deed, or deeds, of the premises sold; that out of the moneys arising from such sale, after deducting the amount of the fees and expenses on such sale, and any lien, or liens, upon said premises so sold for taxes, assessments or water rates, at the time of such sale, and the amount necessary to redeem the property sold, from any liens

for unpaid taxes, assessments or water rates, which have not apparently become absolute, the said referee pay to the plaintiff, or to his attorney, the sum of dollars, adjudged to the plaintiff for costs and disbursements in this action, with interest thereon, from the date hereof; that he pay to M. N., guardian *ad litem* for said infant defendant, R. P., the sum of dollars, as an allowance of costs, and that he also pay to the plaintiff, or to his attorney, the amount so reported due to him, as aforesaid, together with the legal interest thereon, from the date of said report, or so much thereof, as the purchase money of the mortgaged premises will pay of the same, and that he take a receipt therefor, and file it with his report of sale; that he pay over the surplus money, if any there should be, arising from the said sale, to the treasurer of said county of , (*or, if the property is situated in the city of New York, to the chamberlain*), within five days after the same is received and ascertainable, subject to the order of this court; that he make a report of such sale, and file it with the clerk of this court, with all convenient speed; that if the proceeds of such sale are insufficient to pay the amount so reported due to the plaintiff, with the interest and costs, as aforesaid, then that the said referee specify the amount of such deficiency in his report of sale, and that the defendants, C. D., J. H. and H. O., pay to the plaintiff the residue of the debt remaining unsatisfied, after a sale of the mortgaged property, and the application of the proceeds thereof, pursuant to the directions contained herein, and that the plaintiff have execution therefor, and that the purchaser, or purchasers, at such sale, be let into possession on production of the referee's deed.

And it is further adjudged, that the defendants, and all persons claiming under them, or any or either of them, after the filing of the said notice of the pendency of this action, be forever barred and foreclosed of all right, title, interest and equity of redemption, in the said mortgaged premises, so sold, and in every part thereof.

The following is a description of the mortgaged premises, hereinbefore mentioned: [*Insert description of the premises as contained in the mortgage and the complaint*].

No. 18.

Judgment of Foreclosure and Sale.

Part only Due—Premises Sold in One Parcel. (As in Preceding Form No. 17, to * and Continue).

To ascertain and compute the amount due, and yet to become due, to the plaintiff, on the bond and mortgage set forth in the complaint, including the interest thereon, to the date of his report, and also, to ascertain the situation of the mortgaged premises, and whether the same can be sold without prejudice to the interests of the parties, by which report, bearing date the day of , 19 , it appears that the amount due to the plaintiff, with interest, to the date of said report, is the sum of dollars, and that the amount which is not yet due to the plaintiff, but which will hereafter become due to him, on said bond and mortgage, including interest thereon, to the date of said report, is the sum of dollars, and, that the whole amount secured by said bond and mortgage, and still remaining unpaid, including interest thereon, to the date of said report, is the sum of dollars, and that the said mortgaged premises can not be sold in separate parcels, without injury to the interests of the parties, for the reason that [insert reason as contained in the referee's report].

Now on motion of T. R., attorney for the plaintiff, and after hearing J. Z., attorney for the defendant, C. D., in opposition thereto, it is

ORDERED, [*Continue as in preceding Form No. 17, except that the direction to pay the "amount due," should be changed to a similar direction*] pay to the plaintiff, or his attorney, the whole amount so reported to be secured by the said bond and mortgage, and still remaining unpaid, together with the legal interest.

And it is further adjudged, that in case the amount reported as actually due to the plaintiff, with interest, and the costs of this action, shall be paid before such sale, the plaintiff shall be at liberty at any time hereafter, when any of the principal sum or interest, secured by said bond and mortgage, shall become due, to apply to the aforesaid referee, who is hereby continued a referee for that purpose, under, and in pursuance of, this judgment, and obtain a report of the amount which shall then be due; to the end, that upon the coming in and confirmation of such report,

a judgment may be made for a sale of the said premises, to satisfy the amount which shall then be due, with interest, and the costs of such report and sale.

And it is further adjudged, that, in case the said premises shall be sold under this judgment, and shall not produce sufficient to satisfy the amount so reported as being secured by the said bond and mortgage, and still remaining unpaid, with interest, and the costs of this action and of such sale, the plaintiff may, at any time thereafter, when any future installment of principal or interest on said bond and mortgage shall become due, apply to this court, for an execution against the said defendant C. D., who is personally liable for the payment of the debt secured by the said mortgage, for the amount which shall then be due, with interest, and the costs of such application.

The following is a description of the mortgaged premises hereinbefore mentioned: [*Insert description*].

No. 19.

Judgment of Foreclosure and Sale.

Part Only Due—Premises to be Sold in Separate Parcels.

[*As in preceding Form No. 18, except that the opinion of the referee to the effect, that the premises can be sold in parcels without injury to the interests of the parties, should be stated according to the facts. The addition to Form No. 17, immediately before the description should be as follows*]:

And it is further adjudged, that the plaintiff be at liberty, at any time hereafter, as any installment of principal or interest, secured by said bond and mortgage, shall become due, to apply to the aforesaid referee, who is hereby continued a referee for that purpose, under, and in pursuance of this judgment, and to obtain a report as to the amount which shall then be due to the plaintiff, to the end that, upon the coming in and confirmation of such report, and order may be made for a sale of the residue of said premises, not sold under this judgment, to satisfy the amount which shall then be due, with interest, and the costs of such report and sale.

And it is further adjudged, that in case the said premises shall be sold under this judgment, and shall not produce sufficient

to satisfy the amount so reported as secured by the said bond and mortgage, and still remaining unpaid, with interest, and the costs of this action, and of such sale, the plaintiff may, at any time thereafter, when any future installment of principal or interest, on said bond and mortgage, shall become due, apply to this court for an execution against the said defendants, C. D., J. H. and H. O., who are personally liable for the payment of the debt secured by the said bond and mortgage, for the amount which shall then be due, with interest, and the costs of such application.

The following is a description of the mortgaged premises, hereinbefore mentioned and specified, and the order in which the said several parcels thereof are to be sold separately, to wit:

I. The lot or parcel, to be sold first, is bounded as follows: *[Insert description]*.

II. The lot or parcel, to be sold next or second, is bounded as follows: *[Insert description]*.

No. 20.

Judgment of Foreclosure and Sale.

Direction to be Inserted in Judgment for a Sale of Separate Parcels in the Inverse Order of Alienation.

[Insert at the end of the judgment, immediately before the description]:

And it is further adjudged, that the said referee summon before him all of the parties who have appeared in this action, and that he take proof of the order and manner of alienation of the mortgaged premises, and that if it shall appear to the said referee, that separate parcels of the said mortgaged premises have been conveyed or incumbered by the said mortgagor, or by those claiming under him, subsequently to the lien of the plaintiff's mortgage, the said referee shall sell the mortgaged premises in parcels, in the inverse order of their alienation, according to the equitable rights of the parties who are subsequent grantees or incumbrancers, as such rights shall be made to appear to said referee.

No. 21.

Judgment of Foreclosure and Sale.

Provision to be Inserted in Judgment for Sale, When One of the Defendants is Merely a Surety.

And it is further adjudged, that if the plaintiff is not able to collect the amount of such deficiency out of the estate of the said [*naming mortgagor*], upon the issuing of an execution against his property, to the sheriff of the county in which he resides, or of the county where he last resided in this state, the defendants, [*naming the sureties*], upon the return of such execution unsatisfied, pay so much of such deficiency, as the proceeds of the sale hereinbefore directed, and the amount, if any, which shall have been collected of the said [*naming mortgagor*], personally, (subsequent to the assignment by said sureties to the plaintiff), exclusive of the costs and expenses of the foreclosure and sale, shall be less than the principal (*or other limit of sureties' liability*), and the interest thereon, from the time of the commencement of this action, to the time of such sale, with the interest on that part of the deficiency, from the time of the said sale, until it shall be so paid by them.

And it is further adjudged, that if they pay the amount thus decreed against them personally, or if the same is collected out of their property, they shall have the benefit of this judgment, against the said [*naming mortgagor*], for the purpose of enabling them to obtain remuneration from him, to the same extent with interest, but no further, either by a new execution against his property, or by bringing an action thereon, as they may think proper.

No. 22.**Notice of Sale Under Judgment.**

[*Title of the action*].

In pursuance of a judgment of foreclosure and sale, made and entered in the above entitled action, bearing date the day

of , 19 , and entered in the county clerk's office on the day of , 19 , I, the undersigned referee, in said judgment named, (*or* the sheriff of the county of), will sell at public auction, at the , in the city of , county of , and state of , on the day of , 19 , at o'clock in the noon of that day, the following described premises: [*Insert description*].

Dated the day of , 19 .

T. R.,
Plaintiff's Attorney.

J. R.,
Referee (or Sheriff).

No. 23.

Terms of Sale.

[*Title of the action*].

The premises described in the annexed notice of sale, will be sold under the direction of J. R., referee (*or* sheriff of the county of), upon the following terms:

I. Ten per centum of the purchase money of the said premises will be required to be paid to the said referee (*or* sheriff), at the time and place of sale, for which the referee's (*or* sheriff's) receipt will be given.

II. The balance of said purchase money will be required to be paid to said referee (*or* sheriff), at his office, No. , in the city of , on the day of , 19 , at which time the said referee's (*or* sheriff's) deed, will be ready for delivery.

III. The referee (*or* sheriff), is not required to send any notice to the purchaser; and if he neglects to call at the time and place above specified, to receive his deed, he will be charged with interest thereafter, on the whole amount of his purchase, unless the referee (*or* sheriff), shall deem it proper to extend the time for the completion of said purchase.

IV. All taxes, assessments and water rates upon said premises, will be allowed by the referee (*or* sheriff), out of the purchase money, provided the purchaser shall, previously to the delivery of the deed, produce to the referee (*or* sheriff), proof of such liens and duplicate receipts of the payment thereof.

V. The purchaser of said premises, or of any portion thereof,

will, at the time and place of the sale, sign a memorandum of his purchase, and pay, in addition to the purchase money, the auctioneer's fee of ten dollars, for each parcel separately sold.

VI. The biddings will be kept open, after the property is struck off, and, in case any purchaser shall fail to comply with any of the above conditions of sale, the premises so struck down to him, will be again put up for sale under the direction of said referee (*or sheriff*) under these same terms of sale, without application to the court, unless the plaintiff's attorney shall elect to make such application; and such purchaser will be held liable for any deficiency that may exist between the sum for which said premises were struck off upon the sale, and that for which they may be sold on the resale, and also for all costs and expenses occurring on such resale.

VII. [*If there is a prior incumbrance*]. The said premises will be sold subject, however, to a mortgage for dollars, and interest thereon, from the day of , 19 , and subject to [*describing any other incumbrances*].

J. R.,

Referee (or Sheriff).

MEMORANDUM OF SALE.

I, M. N., have this day of , 19 , purchased the premises described in the annexed printed notice of sale, for the sum of dollars, and I hereby promise and agree to comply with the terms and conditions of sale of said premises, as above mentioned and set forth.

Dated 19 .

M. N.,

Purchaser.

RECEIPT.

\$

Received from M. N., the sum of dollars, being ten per centum of the amount bid by him, for the property sold by me, under the judgment in the above entitled action, and pursuant to the foregoing terms of sale.

Dated 19 .

J. R.,

Referee (or Sheriff).

No. 24.

Affidavit of Posting Notice of Sale.[*Title of the action*].

COUNTY OF , ss.:

, being duly sworn, says that he is more than 21 years of age, and resides at ; that on the day of , 19 , he posted, and conspicuously fastened up, a printed notice of sale, of which the prefixed notice is a copy, in three public places, in the city of , in said county of , as follows: one notice on the outer door of the court house in said city; one notice on the bulletin board at ; one notice in the post-office at ; that said city of , is the place where said sale is to take place, as mentioned in said notice; and that the day of , 19 , it at least forty-two days before the day of sale, mentioned in said notice.

Deponent further says, that on the said day of , 19 , he also posted, and conspicuously fastened up, said printed notice of sale in three public places, in the town of , in said county of , as follows: one notice of sale in the store of ; one notice in the post-office of said town; one notice in the hotel; that said town of , is the town where the property described in said notice, is situated; and that said day of , 19 , is at least forty-two days before the day of sale mentioned in said notice.

[*Jurat.*]

No. 25.**Referee's Report of Sale.**[*Title of the action*].

To the court of :

In pursuance and by virtue of a judgment of this court, granted in the above entitled action, at a term thereof, held at , on the day of , 19 , and heretofore duly entered, by which it was, among other things, ordered and adjudged, that all and singular the mortgaged premises mentioned in the complaint

in this action, and hereinafter described, or so much thereof as might be sufficient to discharge the mortgage debt, the expenses of the sale and the costs of the action, and which might be sold separately without material injury to the parties interested, be sold at public auction, in the county of _____, by or under the direction of the undersigned referee (*or* sheriff); that the referee (*or* sheriff) give public notice of the time and place of such sale, according to law and the rules and practice of this court; that the plaintiff, or any of the parties to this action, might become a purchaser on such sale; that the referee execute a deed to the purchaser of the mortgaged premises so sold; that said referee pay all taxes, assessments and water rates, which are liens upon the property sold, and the amount necessary to redeem the property sold from any sales for unpaid taxes, assessments or water rates which have not apparently become absolute; that said referee pay to the said plaintiff, or his attorney, out of the proceeds of the sale, _____ dollars, his costs and charges in this action as adjusted, with interest from the date of said judgment, and also the amount reported due to the plaintiff, together with the legal interest thereon from the date of the referee's report, or so much thereof as the purchase money of the mortgaged premises would pay; that the referee take the plaintiff's receipt therefor and file the same with his report; that he pay the surplus moneys arising from said sale, if any there should be, into court, to the treasurer of the county of _____, (*or*, to the chamberlain of the city of New York), within five days after the same should be received and ascertainable, for the use of the person or persons entitled thereto, subject to the further order of this court; and that if the moneys arising from said sale should be insufficient to pay the amount so reported due to the plaintiff, with the interest, costs, taxes and expenses aforesaid, the said referee (*or* sheriff), specify the amount of such deficiency in his report of sale,

I, the undersigned, J. R., the referee (*or* sheriff) named in said judgment, do respectfully certify and report such sale and proceedings as follows:

That, having been charged by the attorney for the plaintiff with the execution of said judgment, I advertised said premises to be sold by me, at public auction, at _____, in the town (*or* city) of _____, in the county of _____, on the _____ day of _____, 19____, at _____ o'clock in the _____ noon; that previous to said sale, I caused notice thereof to be publicly advertised for _____ weeks successively, as follows, to wit: by causing a printed notice thereof to be

fastened upon three public and conspicuous places in the , where the said premises were to be sold, and also in three public and conspicuous places in the , where the said mortgaged premises are situated, at least days before the sale, and also by causing a copy of such notice to be published once in each week during the weeks immediately preceding such sale, in a public newspaper printed in said county of , to wit: the , published at , in said county, which notice contained the same description of said mortgaged premises as did said judgment.

And I do further report, that on the day of , 19 , the day on which said premises were so advertised to be sold as aforesaid, I personally attended, at the time and place fixed for said sale, and exposed said premises for sale at public auction to the highest bidder, and that the said premises were then and there fairly struck off to , for the sum of dollars, he being the highest bidder therefor and that being the highest sum bidden for the same.

And I do further report that I have executed, acknowledged and delivered to the said purchaser, the usual referee's (*or* sheriff's) deed for said premises, and have paid over or disposed of the purchase money, or the proceeds of said sale, as follows, to wit: I have paid to the attorney for the plaintiff the sum of dollars, being the amount of his costs of this suit, as adjusted, with interest, and have taken his receipt therefor, which is hereto annexed.

I have also retained in my hands the sum of dollars, being the amount of my fees and disbursements on said sale, including the expense for publishing the notice of sale.

I have paid to the plaintiff (*or* his attorney) the sum of dollars, adjudged to him, and have taken his receipt therefor, which is hereto annexed.

I have paid to the county treasurer of county, for the use of the person or persons entitled thereto, the sum of dollars, the surplus herein, and have taken his receipt therefor, which is hereto annexed.

I have paid for city taxes\$

For county taxes\$

For printing and posting the notice of sale\$

For all of which receipts are hereto annexed.

I have retained for my fees and commissions\$

Total\$

[*In case of deficiency, instead of the clause for the surplus insert*]:

And I do further report that after such sale herein, and the disposal of the proceeds thereof, as above provided, the amount of the deficiency is the sum of dollars, with interest thereon from the date of this report.

And I do further report that the premises so sold and conveyed by me, as aforesaid, were described in said judgment and in the deed executed by me, as aforesaid, as follows:

[*Insert same description of premises as in judgment*].

All of which is respectfully submitted to this court.

Dated the day of , 19 .

J. R.,

Referee (or Sheriff).

RECEIPT FOR AMOUNT DUE PLAINTIFF.

[*Title of the action*].

Received, 19 , of J. R., the referee (*or sheriff*), who made the sale of the premises under and by virtue of the judgment in the above entitled action, the sum of dollars, which sum, being part of the proceeds of the sale of said premises, is received by me under and by virtue of the provisions of said judgment, being (*or on account of*) the amount adjudged to be paid to said plaintiff, with interest thereon, as mentioned in said judgment.

T. R.,

Attorney for Plaintiff.

RECEIPT FOR COSTS.

[*Title of the action*].

Received, 19 , of J. R., the referee (*or sheriff*), who made the sale of the premises under and by virtue of the judgment in the above entitled action, the sum of dollars, being the amount of the costs and disbursements of the plaintiff in said action, as taxed, with the interest, which costs are paid by said referee (*or sheriff*) under and by virtue of the provisions of said judgment.

T. R.,

Attorney for Plaintiff.

RECEIPT FOR SURPLUS MONEYS.

[*Title of the action*].

Received, , 19 , of J. R., referee (*or sheriff*) herein, pursuant to the judgment in this action, the sum dollars,

being surplus moneys received on the sale of the premises in the above entitled action.

N. V.,
Treasurer of County.

No. 26.

Order Confirming Report of Sale.

Present: Hon. , Judge. At a term, *etc.*

[*Title of the action*].

The report of J. R., Esq., the referee appointed by the judgment in this action, to sell the mortgaged premises described in the complaint herein, having been duly filed in the office of the clerk of the county of , on the day of , 19 , and on reading and filing due notice of the filing of said report, with due proof of the service thereof on all of the parties who have appeared in this action, and eight days having elapsed since said notice of filing said report was served, and on exceptions having been filed thereto; now on motion of T. R., attorney for the plaintiff, it is

ORDERED, that the said report and the sale therein mentioned, be absolute and binding forever, and that they stand as in all things ratified and confirmed.

No. 27.

Petition to Sell Balance of Mortgaged Premises.

[*Title of the action*].

To the court of :

The petition of E. F., the above named plaintiff, respectfully shows that a judgment of foreclosure and sale was entered in this action in the office of the clerk of county, on the day

of , 19 , on the report of the referee herein, whereby it appears that the sum of dollars was due on the bond and mortgage mentioned in the complaint, on the day of , 19 , and that the amount secured, and not then due, was the sum of dollars.

That such proceedings were thereupon had upon such judgment, that, under and by virtue thereof, a portion of the premises described in said judgment, and in the complaint herein, sufficient for the payment of the amount reported due on said bond and mortgage, and the interest thereon, together with the costs and disbursements, as settled by the clerk of the county of , and entered in said judgment, was sold, and brought the sum of dollars, which said sum paid the costs and expenses on said foreclosure, and a portion of the principal secured by the said mortgage, leaving unpaid on said mortgage, the sum of dollars, with interest thereon from the day of , 19 .

That the premises so sold, comprised the lot first described in the said judgment and complaint, and was the whole of the premises described therein, except the lot last described therein, which said lot so remaining unsold, is bounded and described as follows: [*Insert description from judgment*].

That under and by virtue of the terms of said bond and mortgage, the interest thereon was payable [*state terms of bond and mortgage*]; that the interest on the amount unpaid on said mortgage, became due on the day of , 19 , and remains unpaid; that no party has appeared in said action, except the defendants C. D. and M. D., who have appeared by J. Z., as their attorney, and that none of the defendants herein are infants or absentees.

Wherefore, your petitioner prays, that an order may be granted in this action, founded on said judgment, and directing a sale of said unsold lot, hereinbefore described, under and pursuant to the said judgment, to satisfy the amount due the said plaintiff, with the costs of this proceeding; and as said lot is not capable of division, your petitioner prays that the whole of the premises may be sold, and that the proceeds may be applied to the payment of such costs and interest, and that the balance may be applied to the payment of the amount due on the mortgage of this plaintiff.

Dated the day of , 19 .

E. F.,

Petitioner.

[*Add verification in the usual form*].

No. 28.

Order Directing Sale of Balance of Mortgaged Premises.

Present: Hon. _____, Judge. At a _____ term, *etc.*

[*Title of the action*].

On reading and filing the petition of E. F., the above named plaintiff, by which it appears, among other things, that the sum of _____ dollars remains unpaid on the judgment of foreclosure in the above entitled action, with interest thereon _____, 19____, after the application of all the proceeds of the sale of the premises sold under said judgment, on _____ 19____; that the interest on said sum of _____ dollars, from _____ 19____, became due and payable on the _____ day of _____, 19____, and still remains unpaid; and that all the premises described in said complaint and judgment, have been sold, except a single lot, which said lot can be sold more advantageously by being sold in one parcel; and on reading and filing due proof of the service of this petition and notice of this motion on C. D. and M. D., the only defendants who have appeared herein; now, on motion of T. R., plaintiff's attorney, it is

ORDERED, that the residue of the said mortgaged premises, described in the said complaint and judgment in this action, and remaining unsold, be sold under the direction of the referee heretofore appointed herein, for the payment of the amount remaining unpaid on said mortgage, to wit: the sum of _____ dollars, and interest thereon from _____ 19____, together with the costs of this proceeding, under and pursuant in all respects and according to the terms and the directions for sale contained in said judgment.

And it is further ordered, that the said defendants, and all persons claiming under them, or either of them, after the filing of the notice of the pendency of this action, be forever barred and foreclosed of all right, title, interest and equity of redemption of or in the said mortgaged premises so sold, or any part thereof.

[*Add clause from preceding forms directing judgment for deficiency against certain defendants, if desired*].

No. 29.

Request to Docket Judgment for Deficiency.[*Title of the action*].

SIR:—Please docket a judgment in your office, in favor of E. F., the above named plaintiff, against the defendants C. D. and J. H., for the sum of dollars, and interest thereon from the day of , 19 , for deficiency.

Judgment of foreclosure and sale, and the judgment roll, filed in your office, on the day of , 19 .

Report of J. R., Esq., the referee (*or* sheriff) to sell, named in said judgment, filed in your office on the day of , 19 showing a deficiency of dollars.

Dated the day of , 19 .

T. R.,

Plaintiff's Attorney.

To. R. S., Esq., [*Office and post-office address*].

Clerk of the county of .

No. 30.

Judgment for Deficiency on Foreclosure.At a term, *etc.*

Present: Hon. , *Judge.*

[*Title of the action*].

The report of J. R., the referee (*or* sheriff) appointed to sell the premises described in the judgment in the above entitled action, having been filed on the day of , 19 , by which it appears that the proceeds of said sale were insufficient to pay the amount directed to be paid in and by said judgment, and that there remains due from the defendants C. D. and J. H., to the plaintiff for such deficiency, the sum of dollars, with interest thereon from the day of , 19 , and the said report of sale having been duly confirmed by an order of said

court entered on the day of , 19 ; now, on motion of T. R., attorney for the plaintiff, it is

ADJUDGED, that the plaintiff recover from said defendants C. D. and J. H., the said sum of dollars, with interest thereon from the day of , 19 , amounting in all, to the sum of dollars.

R. S.,
Clerk.

No. 31.

Execution for Deficiency.

The People of the State of , to the Sheriff of the County of , Greeting:

Whereas, by a certain judgment made in the court and entered in the office of the clerk of the county of , on the day of , 19 , in a certain action, wherein E. F. is plaintiff and C. D., J. H. and others, are defendants, it was, among other things, ordered and adjudged, that the mortgaged premises described in said judgment should be sold by and under the direction of J. R., Esq., as referee (*or* sheriff); that the said referee (*or* sheriff) should, out of the proceeds of said sale, retain the costs and expenses of said sale and pay the costs and allowances of the plaintiff and the amount reported due to the plaintiff for principal and interest, or so much thereof as the purchase money of the mortgaged premises would pay of the same; that if the moneys received from said sale should be insufficient to pay the amount so reported due to the plaintiff, with the interest and costs as aforesaid, then that the said referee (*or* sheriff) specify the amount of such deficiency in his report of sale; and that the defendants C. D. and J. H., should pay the same to the plaintiff.

And whereas, the said referee has duly filed his report of sale in the office of the clerk of the county of , from which it appears that the money received from said sale was insufficient to pay the amount so reported due to the plaintiff, with interest and costs as aforesaid, and that the amount of such deficiency is the sum of dollars, and interest thereon from the day of 19 , and the report of said referee has been duly confirmed.

And whereas, said judgment for said deficiency, in favor of E. F., the said plaintiff, and against the said defendants C. D. and J. H., for the sum of dollars, and interest thereon from the day of 19 , was on the day of 19 , duly docketed in the office of the clerk of the county of , and the said sum of dollars, and interest thereon from the day of 19 , is now actually due on said judgment.

YOU ARE, THEREFORE, required to satisfy the said judgment out of the personal property of said judgment debtors, or either of them, within your county; and if sufficient personal property cannot be found, then out of the real property in your county belonging to said judgment debtors, or either of them, on the day of , 19 , when said judgment was so docketed in your county, or at any time thereafter, and to return this execution within sixty days after its receipt by you to the clerk of the county of , where said judgment roll is filed as aforesaid.

WITNESS, Hon. , one of the Justices of said court, this day of , 19 .

T. R.,

Plaintiff's Attorney.

No. 32.

Sheriff's or Referee's Deed on Foreclosure.

THIS INDENTURE, made this day of , 19 , between J. R., the sheriff of the county of , (or the referee, in the action hereinafter mentioned), of the city of , county of , and state of , of the first part, and of the second part.

WHEREAS, at a term of the court of , held at , on the day of , 19 , it was, among other things, ordered, adjudged and decreed, by the said court in a certain action then pending in said court between E. F. plaintiff, and [name all the defendants] defendants, that all and singular, the premises described in a mortgage executed by C. D. and M. D., his wife, to E. F., and recorded in the county clerk's office in liber of mortgages, at page , and being the same premises mentioned in the complaint in said action, and described in said judgment, or such part thereof, as might be sufficient to discharge the mortgage debt, the expenses of the sale, and the costs of said action, and which might be sold separately, without material injury to the parties interested, be sold at public auction, accord-

ing to law and the course and practice of said court, by and under the direction of said sheriff, of said county, (*or* of said J. R.), who was appointed a referee in said action, and to whom it was referred by said judgment, among other things, to make such sale; that the said sale be made in the county where the said mortgaged premises, or the greater part thereof, are situated; that the said referee, (*or* sheriff), give due public notice of the time and place of such sale, according to law and the course and practice of said court; that the plaintiff, or any of the parties to said action, might become a purchaser or purchasers, on such sale; and that the said referee execute to the purchaser or purchasers of said mortgaged premises, or of such part or parts thereof, as should be sold, a good and sufficient deed or deeds of conveyance for the same, and pay all taxes, assessments or water rates, which were liens upon the property sold.

And whereas, the said referee (*or* sheriff), in pursuance of the order and judgment of said court, did, on the day of , 19 , sell at public auction, at [*state the time and place of sale*], the premises described in the said judgment, due notice of the time and place of such sale being first given, pursuant to the said judgment, at which sale, the premises hereinafter described were fairly struck off to the said party of the second part, for the sum of dollars, that being the highest sum bidden for the same.

NOW THIS INDENTURE WITNESSETH, that the said referee, (*or* sheriff), the party of the first part to these presents, in order to carry into effect the sale so made by him as aforesaid, in pursuance of the order and judgment of said court, and in conformity to the statute in such case made and provided, and also in consideration of the premises, and of the sum of money so bidden, as aforesaid, having been first duly paid by the said party of the second part, the receipt whereof is hereby acknowledged, hath bargained and sold, and by these presents doth grant, and convey unto the said party of the second part, all the right, title and interest which the said C. D. and M. D., his wife, the mortgagors aforesaid, had at the time of the execution or recording of said mortgage, it being their interest in said premises so sold and hereby conveyed, in and to [*insert from the judgment the description of the parcel intended to be conveyed*], to have and to hold, all and singular, the premises above mentioned and described, and hereby conveyed, unto the said party of the second part, his heirs and assigns forever.

In Witness Whereof, the said party of the first part, referee

(or sheriff) as aforesaid, hath hereunto set his hand and seal the day and year first above written.

J. R.
Referee.

[*Acknowledgment in the usual form*].

No. 33.

Affidavit on Application for Order of Possession.

[*Title of the action*].

COUNTY OF , ss.:

M. N., being duly sworn, says that this action was brought for the foreclosure of a mortgage on certain real estate situated in the said county of , and state of ; that judgment of foreclosure and sale was entered herein in the office of the clerk of the county of , on the day of , 19 , J. R. Esq., of the city of , being therein duly appointed the referee to sell; that said judgment contained the usual provision that the purchaser be let into possession on the production of the referee's deed, to which said judgment, reference is hereby had as part hereof; that due notice of said sale was given by said referee, and that on the day of 19 , the mortgaged premises described in said judgment were duly sold at public auction by said referee to this deponent for the sum of dollars, that being the highest sum bidden for the same; that this deponent has duly paid the said purchase money, and that the said referee has also executed, acknowledged and delivered to deponent a deed of conveyance of said mortgaged premises; that the report of sale of said referee was duly filed in the office of the clerk of this court on the day of , 19 , to which reference is hereby had as a part hereof, and that said report has been duly confirmed; that on the day of , 19 , deponent went to the said mortgaged premises and found C. D., who is one of the defendants in this action, in possession thereof; that he then produced and showed to said C. D. the said deed of said referee and demanded to be let into possession by virtue thereof, but the said C. D. refused and still refuses to surrender the said premises,

or any part thereof, and still forcibly holds possession thereof from deponent.

[*Jurat*].

M. N.

No. 34.

Order for Possession.

Present: Hon.

, Judge.

At a term, *etc.*

[*Title of the action*].

On reading and filing the affidavit of M. N., the purchaser at the sale of the mortgaged premises in this action, verified 19 , and on all of the papers and proceedings herein, including the judgment of foreclosure and sale, entered herein in the office of the clerk of the county of , on the day of , 19 , and on the report of the sale by J. R., Esq., the referee appointed to sell, filed in said office, on the day of , 19 , and on the order confirming said report entered herein on the day of , 19 , and on the deed from the said referee to said M. N., which said deed bears date the day of , 19 , and on the notice of this motion, with due proof of the service thereof on the defendant, C. D., who is now in possession of the said premises; and after hearing X. Y., Esq., attorney for the said M. N., the purchaser, and J. Z., Esq., attorney for the said C. D., in possession thereof, it is

ORDERED, that the sheriff of the county of , be, and he is hereby required, forthwith to put the said M. N. into possession of the said premises, and that this order be executed as if it were an execution for the delivery of the possession of said premises.

The said premises are described as follows: [*Insert description*].

No. 35.

Affidavit on Which to Apply for a Receiver of Rents.

[*Title of the action*].

COUNTY OF , ss.:

Sealed with our seals, and dated the day of , 19 .

E. F., being duly sworn, says that he is the plaintiff in this

action; that this action is brought to foreclose a mortgage given to secure the payment of the sum of dollars, and interest thereon, from the day of , 19 , on the following described premises: [*Insert description*].

That said mortgage is a second mortgage, and is inferior as a lien to a mortgage for dollars upon the same premises, held by , upon which there is now unpaid and owing interest from the day of , 19 .

That there are unpaid taxes and assessments on said premises, amounting at this date, to the sum of dollars, as nearly as can be ascertained by deponent, being as follows: the general tax for the year 19, for dollars, and interest thereon, and on assessment for dollars, for paving street, and interest thereon.

That the whole amount of the incumbrances on said property, including the plaintiff's claim, and the said prior mortgage, and the costs and expenses of this action, and of a sale, will amount at least to the sum of dollars.

That the said mortgaged premises are an inadequate and insufficient security for the plaintiff's demand, and that they are not worth more than the sum of dollars, as deponent verily believes; that the grounds of deponent's belief are [*State fully the reasons for fixing the value of the property at the sum named*].

That the defendant, C. D., is the only person who is personally obligated for the payment to the plaintiff of the said mortgage debt, and that the said defendant is entirely irresponsible and insolvent. [*State reasons for believing this to be so*].

That there are judgments against said defendant, which are unsatisfied of record, and that the defendants O. H. and G. K., are holders of said judgments, and are made parties to this action for that reason.

That said mortgaged premises are rented to the defendant C. L., at the price, as deponent is informed and believes, of the sum of dollars per year (*or month*), and that the said defendant (*mortgagor*), is collecting and receiving the rents therefor.

[*Jurat*].

E. F.

No. 36.

Order Appointing Receiver of Rents.

Present: Hon. _____, Judge. At a _____ term, etc.

[*Title of the action*].

On reading and filing the affidavit of E. F., verified _____, 19____, and the notice of this motion, with proof of the due service thereof, and on the complaint which has been filed herein; and it appearing that the mortgaged premises are an inadequate security for the mortgage debt, and that no one, except the defendant C. D., is personally liable therefor, and that he is insolvent, and that said defendant is about to collect the rents; and after hearing T. R., attorney for the plaintiff, in support of the motion, and J. Z., attorney for the defendant C. D., in opposition thereto, it is

ORDERED, that J. B., of the city of _____, counselor at law, be, and he hereby is appointed, with the usual powers and directions, receiver of all the rents and profits now due and unpaid, or to become due, pending this action, and issuing from the mortgaged premises mentioned in the complaint, and described as follows: [*Insert description*].

That before entering upon the duties of his trust, the said receiver execute to the people of this state, and file with the clerk of this court, his bond with two sureties, to be approved by a judge of this court, in the penal sum of _____ dollars, conditioned for the faithful performance of his duties as such receiver.

That said receiver be, and he hereby is directed to demand, collect and receive from the tenant or tenants in possession of said premises, or other persons liable therefor, all the rents thereof, now due and unpaid, or hereafter to become due.

That tenants in possession of such premises, and such other person or persons as may be in possession thereof, do, and they are hereby directed to attorn as such tenant or tenants, to said receiver, and until the further order of this court, to pay over to such receiver all rents of such premises, now due and unpaid, or that may hereafter become due.

That all tenants of the premises, and other persons liable for such rents, are hereby enjoined and restrained from paying any

rent for such premises, to the defendant, his agents, servants or attorneys.

That all persons now, or hereafter in possession of said premises, or any part thereof, and not holding such possession under valid and existing leases, do forthwith surrender such possession to said receiver.

That the said receiver be, and he hereby is authorized to institute and carry on all legal proceedings necessary for the protection of all premises described in the complaint or referred to in this order, including such proceedings as may be necessary to recover possession of the whole, or any part of said premises, and to institute and prosecute suits for the collection of rents now due, or hereafter to become due on the aforesaid premises, or any part thereof; and to institute and prosecute summary proceedings for the removal of any tenant or tenants, or other persons therefrom.

And said receiver is hereby authorized, from time to time, to rent or lease, as may be necessary, for terms not exceeding one year, any of said premises; to keep the property insured against loss or damage by fire, and in repair, and to pay the taxes, assessments and water rates upon said premises.

That said receiver is hereby authorized to employ an agent, if he shall deem proper, to rent and manage said premises, to collect the rents, and to keep the premises insured and in repair, and to pay the reasonable value of his services, out of the rent received.

That during the pendency of this action, the defendant and his agents and attorneys, be enjoined and restrained from collecting the rents of said premises, and from interfering, in any manner, with the property or its possession.

That the said receiver retain the moneys which may come into his hands, by virtue of his said appointment, until the sale of the premises mentioned in the complaint under the judgment to be entered in this action; and that he then, after deducting his proper fees and disbursements therefrom, apply the said moneys to the payment of any deficiency there may be, of the said amount directed to be paid to the plaintiff, in and by the said judgment; and in case there is no such deficiency, that he retain the said moneys in his hands, until the further order of this court in the premises.

That the said receiver, or any party hereto, may at any time, on proper notice to all parties who may have appeared in this action, apply to this court for further or other instructions and power, necessary to enable said receiver properly to fulfill his duties.

No. 37.

Bond of Receiver.*[Title of the action].*

KNOW ALL MEN BY THESE PRESENTS, that we, J. B., of the
 of , county of , and state of , as principal,
 and O. P. and R. S., of the same place, as sureties, are held and
 firmly bound unto the people of the state of , in the sum
 of dollars, to be paid unto the said people of the state
 of ; for which payment well and truly to be made, we bind
 ourselves, our heirs, executors and administrators, jointly and
 severally, firmly, by these presents.

Sealed with our seals, and dated the day of , 19 .

Whereas, by an order of this court, entered in the above
 entitled action, on the day of , 19 , the above bounden
 J. B. was appointed receiver of the rents and profits of the mort-
 gaged premises described in the complaint herein.

Now, the condition of this obligation is such, that if the above
 bounden J. B. shall, according to the rules and practice of this
 court, duly file his inventory, and annually or oftener, if thereunto
 required, duly account for what he shall receive or have in
 charge, as receiver in the said action, and apply what he shall
 receive or have in charge, as he may from time to time be
 directed by the court; and if he shall faithfully perform his duties
 as such receiver, in all things, according to the true intent and
 meaning of the aforesaid order, then this obligation to be void;
 otherwise to remain in full force and virtue.

[Signatures and seals].

COUNTY OF , ss.:

O. P. and R. S., being severally duly sworn, say, each for him-
 self, that he is a householder (*or freeholder*) in this state, and is
 worth the sum of dollars [*double the amount of the penalty
 of the bond*], over and above all his debts and liabilities, and
 exclusive of property exempt by law from levy and sale under an
 execution.

*[Jurat].**[Signatures].*

COUNTY OF , ss.:

On this day of , 19 , before me, the subscriber,
 personally appeared J. B., O. P. and R. S., to me known to be

the individuals described in, and who executed the within instrument, and they severally acknowledged to me that they executed the same.

[Signature of Officer].

[Indorsed], Approved the day of , 19 .

[Signature of Judge].

No. 38.

Notice of Claim to Surplus Moneys.

[Title of the action].

To R. S., Esq., clerk of the county of :

SIR:—Take notice that D. B., who resides at , in the of , is entitled to the surplus moneys, or some part thereof, arising from the sale of the mortgaged premises, under the judgment of foreclosure and sale entered in the above entitled action; that the nature and the extent of the claim of the said D. B. is as follows: [State nature of claim, as]:

That the said D. B. is the owner of a judgment for dollars, and interest from the day of , 19 , obtained by him in the court, against the defendant C. D., on the day of , 19 , and docketed in the county clerk's office on the day of , 19 , and while the said defendant was the owner of the equity of redemption in the said mortgaged premises, and before the sale thereof under foreclosure; that there is now due upon said judgment the sum of dollars, with interest from the day of , 19 , and that the said D. B. claims that the said judgment is a lien upon said mortgaged premises next in priority after the mortgage of the plaintiff in this action, and is the first lien upon said surplus moneys.

Dated the day of , 19 .

D. B., Claimant,

by R. A., His Attorney.

[Office and post-office address].

No. 39.

Affidavit on Motion for Reference to Distribute Surplus Moneys.*[Title of the action].*

COUNTY OF , ss.:

R. A., being duly sworn, says that he is attorney for D. B., one of the defendants in the above entitled action (*or*, who had a lien on the mortgaged premises at the time of the sale in this action).

That this action was brought for the foreclosure of a mortgage upon certain premises therein described, situated in the county of .

That on the day of , 19 , a final judgment was entered therein, in the county clerk's office, for the foreclosure of said mortgage and a sale of said premises, and that said premises were sold pursuant to said judgment, by J. R., referee (*or* sheriff of the county of), on the day of , 19 .

That the report of said referee (*or* sheriff), dated , 19 , has been filed with the clerk of the county of , by which report it appears that, after paying the amounts directed in and by said judgment to be paid out of the proceeds of said sale, there remained a surplus of dollars, which amount has been paid by said referee (*or* sheriff) into court, and deposited with the treasurer of county (*or*, in the city of New York, with the chamberlain of the city of New York), to the credit of this action, and for the use of the persons entitled thereto.

That said D. B. is entitled to said surplus moneys, or some part thereof, and that the nature and extent of his claim thereto are set forth in the notice hereinafter mentioned, a copy of which is hereto annexed.

That from all the searches for conveyances and incumbrances made in this action and filed with the judgment roll herein, the following and no other unsatisfied liens upon said surplus moneys appear, to wit: [*specify liens*], and that no other unsatisfied liens thereon are known to this deponent to exist.

That the notice of the claim of said D. B. to such surplus moneys has been filed by him with the clerk of the county of , a copy of which notice is hereto annexed and marked "Exhibit A."

[Jurat].

R. A.

No. 40.

Notice of Motion for Reference to Distribute Surplus Moneys.

[*Title of the action*].

SIRS:—Take notice that on the annexed affidavit of R. A., and upon the pleadings and all the proceedings and papers in this action, the claimant, D. B., will apply to this court, at a term thereof, to be held at , on the day of , 19 , at the opening of court on that day, or as soon thereafter as counsel can be heard, for an order of reference to a suitable referee to be selected by the court, to ascertain and report the amount due to D. B., or to any other person, which is a lien upon the surplus moneys received upon the sale of the mortgaged premises in this action, and to ascertain the priorities of the several liens thereon, to the end that on the coming in and confirmation of the report on said reference, such further order may be made for the distribution of such surplus moneys, as may be just, and for such other or further relief as the court may deem proper.

Dated the day of , 19 .
R. A.,

Attorney for Claimant, D. B.
[*Office and post-office address*].

To T. R., Esq.,

Attorney for Plaintiff.

[*Name the parties or their attorneys who have appeared in the action or filed a notice of claim with the clerk, previous to the granting of the order of reference*].

No. 41.

Order of Reference as to Claims to Surplus Moneys.

Present: Hon. , Judge. At a term, etc.

[*Title of the action*].

On reading and filing the affidavit of R. A., and notice of this

motion, with due proof of the service thereof on all of the parties who have appeared herein, or who have filed with the clerk of this court, a notice of claim to the surplus moneys, or some part thereof; and on motion of R. A., attorney for the claimant D. B., and after hearing C. R., counsel for P. S., in opposition thereto, (*or, no one appearing in opposition thereto*), it is

ORDERED, that it be referred to O. N., Esq., counselor at law, of _____, as referee, to ascertain and report the amount due to D. B., and to every other person, who has a lien upon the surplus moneys in this action, and to ascertain the priorities of the several liens thereon, to the intent that on the coming in and confirmation of the report of said referee, such further order may be made for the distribution of such surplus moneys, as may be just, and that the said referee make his report thereon with all convenient speed. [*If unsatisfied liens appear from the searches on file, or are known to exist, the court should designate the manner of serving the notice upon the holders of such liens, for example*]:

And it is further ordered, that in addition to the other notices required by the rules of this court, notice of the proceedings on such reference, be given to G. H. and L. M., either by service on them personally, or by leaving the same at their respective places of residence, not less than _____ days prior to the hearing.

No. 42.

Subpœna to Attend Reference.

[*Title of the action*].

SIRS:—I. O. N., the referee appointed by an order of this court, granted at a _____ term thereof, held at the _____ of _____, on the _____ day of _____, 19____, to ascertain and report the amount due to the defendant D. B., and to any other person who has a lien upon the surplus moneys, arising upon the sale of the premises described in the complaint in this action, and to ascertain the priorities of the several liens thereon, do hereby appoint the _____ day of _____, 19____, at _____ o'clock in the _____ noon, for the hearing of matters so referred to me, at which time and place all parties concerned are to attend.

Dated the _____ day of _____, 19____.

O. N., *Referee*.

To . [Name all the parties who appeared in the action, or who filed a notice of claim with the clerk previous to the entry of the order of reference, also the owner of the equity of redemption, and all persons who are known to have unsatisfied liens.]

No. 43.

Certificate of Clerk as to Who Have Appeared and Filed Claims Against the Surplus Moneys.

[Title to the action].

I, R. S., the undersigned, clerk of the county of , and of the above named court, do hereby certify, that the following named defendants, and no others, have entered appearances in this action, to wit: C. D., by his attorney, J. Z., and D. B., by his attorney, R. A.

I further certify, that the following notices of claim to the surplus moneys in the above entitled action, and no others, were filed in my office, previous to the entry of the order of reference as to such surplus moneys, to wit: one claim on the part of C. D., another on the part of D. B., [name other claims in like manner]; and that no notice of claim to such surplus was annexed to the referee's report of sale, filed in my office on the day of , 19 .

Dated the day of , 19 .
[Seal].

R. S.,
Clerk.

No. 44.

Claim of Creditor Before Referee, to Surplus Moneys.

[Title of the action].

To O. N., Referee:

The claim of G. D., (a judgment) creditor of C. D., the defendant in this action, to the surplus moneys arising from the sale of the mortgaged premises under the decree herein, respectfully states that he resides at , in the county of , and state of ; that he has a lien upon the said surplus moneys,

by virtue of a judgment recovered in the surpeme court, against the mortgagor C. D., for the sum of dollars, on the day of 19 , and docketed in county clerk's office, on the day of 19 , while he, the said C. D., was the owner of the equity of redemption in said mortgaged premises, and before the commencement of this action, which lien is next in priority after the mortgage of the plaintiff, the whole of which judgment is still due and unpaid.

Wherefore, he claims the whole of said surplus moneys from said sale, which only amount to the sum of dollars.

Dated the day of , 19 .

G. D.,
Claimant.

County of , ss.:

G. D., the above named claimant, being duly sworn, says that the facts set forth in the above claim are true; that the amount therein claimed as being due to him upon the judgment therein mentioned, is justly due; that neither he, nor any person by his order, to his knowledge or belief, or for his use, has received the amount that is claimed, or any part thereof, or any security or satisfaction whatever for the same, or any part thereof.

[*Jurat*].

G. D.

No. 45.

Referee's Report on Surplus Moneys.

[*Title of the action*].

To the court of :

I, the undersigned, referee appointed by an order of this court, granted on the day of , 19 , to ascertain and report the amount due to D. B., and to any other person who has a lien upon the surplus moneys in this action, and to ascertain and report the priorities of the several liens thereon, do respectfully report :

That I caused all parties who have appeared in this action, and all persons who have filed notices of claim upon the surplus moneys, and all persons who were known to have liens thereon, as appears by the certificate of the clerk, which is hereto annexed,

showing who have appeared in the action and filed notices of claim, and by the affidavit of R. A., attorney for the claimant D. B., showing what liens appear upon the searches on file, to be summoned to appear before me, as appears from the proof of service of the subpoena herein, which is also hereunto annexed.

That on said hearing I was attended by R. A., attorney for the claimant, D. B., and by [*such other persons as appeared*]; that the testimony of the witnesses upon such hearing was read and signed by them; and that such testimony and all the evidence, except such of it as was documentary, is annexed to this report.

That from such testimony and evidence, I make the following

FINDING OF FACT:

I. That the amount of the surplus moneys in this action, is the sum of dollars, as appears by the certificate of the county treasurer of the county of , which is hereto annexed.

II. [*Set forth the full findings of fact of the referee as in the trial of issues in an action*].

And from the foregoing findings of fact, I further find the following

CONCLUSIONS OF LAW:

I. That there is due and owing to the said claimant D. B., the sum of dollars, and interest thereon, from , 19 , amounting at the date of this report, to the sum of dollars, upon and by virtue of said judgment recovered by him against the said C. D., as aforesaid, and that the said amount is the first lien on the said surplus moneys in this action.

II. [*Continue in the order in which the liens are found until the whole fund is disposed of*].

Dated the day of , 19 .

O. N.,
Referee.

No. 46.

Notice of Motion to Confirm Report and to Distribute Surplus.

[*Title of the action*].

SIRS.—Take notice, that the report of O. N., Esq., the referee appointed herein to ascertain and report the amount due to

D. B., and to any other person, who has a lien on the surplus moneys in this action, and to ascertain the priorities of the several liens thereon, was this day duly filed in the office of the clerk of the county of .

Also that upon said referee's report, and upon the testimony and papers annexed thereto, the claimant D. B., will apply to this court, at a term thereof, to be held at , on the day of , 19 , at the opening of court on that day, or as soon thereafter as counsel can be heard, for an order confirming said report, and directing the treasurer of county to pay to the claimant D. B., or to his attorney, the sum of dollars, with interest thereon, from the day of , 19 , the date of said report, out of said surplus moneys, together with an allowance by way of costs in this proceeding, and for such other and further relief as may be just.

Dated the day of , 19 .

R. A.,

Attorney for said Claimant, D. B.

To

[Names of all parties to whom the subpoena in Form No. DB was addressed].

No. 47.

Order Confirming Report of Referee and Directing Distribution of Surplus Moneys.

Present: Hon. , Judge. At a term, etc.

[Title of the action].

On the report of O. N. Esq., the referee appointed herein to ascertain and report the amount due to D. B., and to any other person, which amount is a lien on the surplus moneys in this action, and to ascertain the priorities of the several liens thereon, which report was dated the day of , 19 , and filed in the office of the clerk of this court, on the day of , 19 , and on all of the testimony and papers annexed to said report and filed therewith; and it appearing that due notice of the filing of said report and of this motion has been given to the

attorneys for the parties who have appeared in this proceeding and who filed notices of claim to such surplus moneys previous to the entry of said order of reference, and after hearing R. A., attorney for the claimant D. B., in support of this motion, and P. S., attorney for the claimant G. D., in opposition thereto, it is

ORDERED, that the said report be, and the same hereby is, in all things confirmed and that the treasurer of county pay out and distribute the moneys in his hands to the credit of this action, after deducting therefrom the fees and commissions allowed to him by law, as follows and in the following order of priority:

I. That he pay to O. N., Esq., referee in this proceeding, the sum of dollars, for his fees as such referee.

II. That he pay to R. A., attorney for the claimant D. B., the sum of dollars, as an allowance by way of costs in this proceeding.

III. That he pay to the claimant D. B., or to his attorney R. A., the sum of dollars, and interest thereon from the day of , 19 , the date of said referee's report.

IV. That he pay to the claimant C. R., or to his attorney P. S., the sum of dollars, and interest thereon from the day of , 19 , the date of said referee's report.

V. That he pay to the claimant C. D., or to his attorney J. Z., the balance of said surplus moneys.

No. 48.

Complaint in Action for Strict Foreclosure.

[*Title of the action*].

[*Commence as in complaint in action to foreclose by a sale, following Form No. 1 to and including paragraph VI., so far as that form may apply*].

That hereafter the said E. F. commenced an action in the court, in the county of , against C. D., M. D. and J. H., for the foreclosure of the said mortgage and for a sale of said mortgaged premises, to satisfy and discharge said indebtedness; that such proceedings were had in said action that, on the day of , 19 , it was duly ordered and adjudged by the said court, that the said mortgaged premises, or so much thereof as might be necessary to raise the amount then due to the said

E. F., for principal, interest and costs, and which might be sold separately without material injury to the parties interested, be sold at public auction, in the county of _____, by and under the direction of J. R., Esq., counselor at law, who was duly appointed referee; that subsequently to the entry of said judgment, and in pursuance thereof, the said referee duly sold said mortgaged premises at public auction to this plaintiff, and this plaintiff duly paid to him the purchase money therefor and received from him a deed of conveyance thereof, all of which will more fully appear by said deed of conveyance, which was, on the _____ day of _____, 19____, duly recorded in the office of the clerk of _____ county, in book No. _____ of deeds, at page _____, by the report of sale of said referee, which was duly filed in the office of said clerk, on the _____ day of _____, 19____, and by the order of said court confirming said report of sale, which was duly entered in said action, on the _____ day of _____, 19____.

That under said foreclosure and sale and the said deed of conveyance of said referee, executed in pursuance of said judgment, the plaintiff entered into possession of said mortgaged premises and the receipt of the rents and profits thereof, and has since continued and still is in possession thereof; that he then believed he had acquired, under said foreclosure, a perfect title to the said mortgaged premises, free from all liens and incumbrances, but that he has since been informed, and believes, that the defendant _____, has, or claims to have, an interest in or a lien upon the said premises by virtue of a certain mortgage [*describe it*], the lien of which mortgage was and is inferior and subsequent to the lien of the mortgage under which said foreclosure sale was made.

That this plaintiff is advised that he has acquired by said foreclosure the title to the said mortgage under which said sale was had, and also the right which C. D. and M. D., his wife, who were defendants in said action, had to redeem from the mortgage held or claimed by the plaintiff, the said C. D. being, at the time of the commencement of said foreclosure, the owner in fee of the title and equity of redemption of said premises; that the amount which was due and owing to the plaintiff in said action on the said mortgage, at the time of the entry of said decree of foreclosure and sale, exclusive of the costs and expenses of said action, and of said sale, was the sum of _____ dollars, and interest thereon from the _____ day of _____, 19____, no part of which has been paid, except as it was paid by the proceeds of said sale, under which this plaintiff claims.

That this plaintiff has laid out and expended large sums for permanent improvements and repairs upon said premises, to wit: *[Describe the improvements and state their cost and value]*.

That the rents and profits received by this plaintiff from said premises, have not been so great in amount as the annual interest on said mortgage, under which said foreclosure was had, and have not amounted to more than the sum of dollars; that the plaintiff claims that the amounts paid by him for taxes, assessments and repairs, and the value of the permanent improvements made by him as aforesaid, should be allowed to him and added to the amount of said mortgage and interest thereon, and that there is now due and owing to him thereon, the sum of dollars.

That the plaintiff has applied to said defendant , and requested him to pay the plaintiff the said sums so due on the said mortgage held by the plaintiff, or to come to an accounting with him thereon, and after the proper charges and credits, to pay to the said plaintiff what should appear to be due him on the said mortgage; or, in default thereof, to release his right and equity of redemption in the said mortgaged premises; but that the said defendant has hitherto refused, and still refuses so to do, or to comply with any part of said plaintiff's request.

Wherefore, the plaintiff demands judgment, that an account may be taken of what is due and owing to the plaintiff for principal and interest on said mortgage, and that an account may also be taken of the rents and profits of the said mortgaged premises which have been received by the plaintiff, and also of the expenditures of the plaintiff for permanent improvements and repairs, and for taxes and assessments.

That the said defendant pay to the plaintiff what may be due him on taking the said account, with the costs of this action, within a time to be appointed by the court for that purpose; or, in default thereof, that the said defendant and all persons claiming under him be absolutely barred and foreclosed of and from all right, title and equity of redemption in and to the said mortgaged premises, and each and every part thereof, and that the plaintiff have such other or further relief, or both, in the premises as may be just and equitable.

T. R.,
Plaintiff's Attorney.

[Add verification in the usual form].

No. 49.

Judgment for Strict Foreclosure.

Present: Hon. _____, Judge. At a _____ term, etc.

[Title of the action].

[Commence by reciting the proceedings in the action, which will be similar to Form No. 17. In all cases, an affidavit of filing the notice of pendency of action, similar to Form No. 9, must be furnished when applying for judgment, and should be recited. The following will be the essential parts of the judgment]:

It is adjudged that, upon the defendant's paying unto the said plaintiff the amount which is so found and reported due to him, as aforesaid, with interest thereon, from the date of said report, together with the further sum of _____ dollars, and interest, from this date, which is hereby adjudged to the plaintiff for his costs and charges in this action, within six months after the entry of this judgment, and service of notice thereof upon the attorney for the defendant, said payment to be made at the office of T. R., Esq., attorney for the plaintiff, No. _____ street, in the _____ of _____, between the hours of 10 A. M. and 3 P. M. of any business day, on or before the expiration of the said six months, and which said day shall have been named by the said defendant in a notice in writing, to be served by him on said attorney for the plaintiff, not less than five days prior to said date; the said plaintiff do then convey the said mortgaged premises to the said defendant, by a suitable and proper deed of conveyance, to be approved by this court, in case the parties cannot agree upon the form thereof, free and clear of all incumbrances suffered by him, or by any person claiming by, from or under him, (and with the usual covenants against his and their acts); and that he deliver up all deeds and writings in his custody relating thereto, upon oath, to the said defendant, or to whomsoever he may appoint to receive the same; and further, that the said plaintiff execute and acknowledge a certificate to cancel and discharge said mortgage of record. But in default of the said defendant's paying unto the plaintiff such principal, interest and costs, as aforesaid, by the time limited for that purpose, then it is adjudged that the said defendant, and all persons claiming by, from or under him, after the filing of the aforesaid notice of pendency of this action, do stand and be forever barred and foreclosed of and

from all right, title, interest and equity of redemption in and to the said mortgaged premises, and every part thereof.

The following is a description of the said mortgaged premises herein mentioned: [*Insert description*].

No. 50.

Order Extending Time for Redemption.

Present: Hon. _____, Judge. At a _____ term, *etc.*

[*Title of the action*].

On reading and filing the affidavit of the defendant, and notice of this motion, with proof of the due service thereof, and on all of the papers and proceedings herein; and, after hearing M. N., attorney for said defendant, on his motion, and T. R., attorney for the plaintiff, in opposition thereto, it is

ORDERED, that the time granted to the said defendant _____, in and by the judgment entered in this action, on the _____ day of _____, 19____, and within which time he was required to redeem the mortgaged premises by paying the amount due to the plaintiff for principal, interest and costs or stand foreclosed, be, and the same is hereby extended and enlarged for _____ months, upon condition that the said defendant shall, within ten days after the entry of this order, pay to the plaintiff the sum of _____ dollars, costs of this motion.

No. 51.

Final Order in Strict Foreclosure.

Present: Hon. _____, Judge. At a _____ term, *etc.*

[*Title of the action*].

Upon the judgment entered in this action, on the _____ day of _____, 19____, and on reading and filing the notice of the entry

of said judgment, with due proof of the service thereof on the defendant, and upon the affidavit of the plaintiff showing that the defendant has not paid the amount due to the plaintiff for principal, interest and costs, or any part thereof, though more than six months have expired since the said service of the notice of the entry of said judgment as aforesaid; and on due notice of this motion, with due proof of the service thereof; and after hearing T. R., attorney for the plaintiff, in support of this motion, and M. N., counsel for the defendant, in opposition thereto, it is

ORDERED, that the said defendant , and all persons claiming under him, after the filing of the notice of the pendency of this action, stand and be forever absolutely barred and foreclosed of and from all right, title, interest and equity of redemption in the mortgaged premises described in said judgment, and in each and every part thereof.

No. 52.

Notice of Sale on Foreclosure by Advertisement.

Whereas, default has been made in the payment of the money secured by a mortgage dated the day of , 19 , executed by C. D. and M. D., his wife, of , to E. F., of the same place, which mortgage was recorded in the office of the clerk of the county of , on the day of , 19 , at o'clock M., in book No. of mortgages, at page , (and which said mortgage was assigned by the said E. F. to H. O., by an assignment of mortgage dated the day of , 19 , and recorded in the county clerk's office, in book No. of assignments of mortgages, at page , on the day of , 19 , and the said H. O. is now the owner and holder thereof).

And whereas, the amount claimed to be due on said mortgage at the time of the first publication of this notice, is the sum of dollars, as follows: the sum of dollars principal, and the sum of dollars interest, which said sum of dollars is the whole amount claimed to be unpaid upon said mortgage.

Now, therefore, notice is hereby given that, by virtue of the power of sale contained in said mortgage, and duly recorded, as aforesaid, and in pursuance of the statute in such case made

and provided, the said mortgage will be foreclosed by the sale of the premises therein described, at public auction, at , in the city of , in the county of , on the day of , 19 , at o'clock in the noon of that day.

The said premises are described in said mortgage as follows:
[Insert description].

E. F., *Mortgagee*,
(or *Assignee of Mortgage*).

T. R., *Attorney for Mortgagee*,
(or *Assignee*).

No. 53.

Notice of Sale on Foreclosure by Advertisement.

Short Form.

MORTGAGE SALE.—Mortgagors C. D. and M. D., his wife; mortgagee E. F.; assignee H. O.; second assignee and present owner and holder of the mortgage, G. H. Mortgage dated , 19 , and recorded in the office of the clerk of county, on the day of , 19 , in book No. of mortgages, at page . The amount claimed to be due upon said mortgage at the date of the first publication of this notice, is the sum of dollars.

Default having been made in the payment of the moneys secured by said mortgage, and no suit or proceedings at law or otherwise, having been commenced to recover said mortgage debt, or any part thereof; now, therefore, notice is hereby given according to the statute in such case made and provided, that by virtue of the power of sale contained in said mortgage, and duly recorded therewith as aforesaid, the said mortgage will be foreclosed by a sale of the premises therein described, by the subscriber, at public auction, at , on the day of , 19 , at o'clock in noon of that day.

The said premises are described in said mortgage as follows:
[Insert description].

Dated the day of , 19 .
G. H.,

Assignee of Mortgage.

T. R.,
Attorney.

No. 54.

Affidavit of Affixing Notice by County Clerk.

COUNTY OF , ss.:

R. S., being duly sworn, says that he is clerk of the county of , that being the county in which the mortgaged premises described in the annexed printed notice of foreclosure and sale are situated; that on the day of , 19 , he received a printed copy of the annexed notice of sale, and that immediately, to wit: on the same day, he affixed the same in a book prepared and kept by him for that purpose, and also immediately entered in said book a minute at the bottom of such notice, of the time of receiving and affixing the same, duly subscribed by deponent as clerk as said county; and that he also immediately indexed the same against the name of the mortgagor, in said notice named.

Deponent further says, that the time when he did and performed said acts, was at least eighty-four days before the day of sale in said notice specified for the sale of the mortgaged premises therein described.

[*Jurat*].

R. S.

 No. 55.
Affidavit of Affixing Notice of Sale to Outer Door of Court House.

COUNTY OF , ss.:

, being duly sworn, says that he resides at , and is more than twenty-one years of age; that on the day of , 19 , and at least eighty-four days prior to the time specified in the annexed printed notice of foreclosure for the sale of the mortgaged premises therein described, he fastened up a printed copy of said notice in a conspicuous place and in a proper and substantial manner, at or near the entrance of the court house or building, in the county of , where the county courts are directed to be held in and for said county of , which is the

county in which said mortgaged premises are situated, that being the building in which the courts in said county are directed to be held, nearest to the mortgaged premises.

[*Jurat*].

No. 56.

Affidavit of Publishing Notice of Sale.

COUNTY OF _____, ss.:

_____, being duly sworn, says that he resides in the city of _____, in the county of _____, and is more than twenty-one years of age; that during the time of the publication of the notice hereinafter mentioned, he was (the foreman of) the printer of the _____, a newspaper, printed and published at _____, in said county of _____, that being the county in which the premises described in the annexed printed notice of sale, or a part thereof, are situated.

Deponent further says that the notice of the mortgage sale, a printed copy of which is hereto annexed, was published in said newspaper at least once in each of the twelve weeks immediately preceding the day of sale in said notice mentioned, said publication having been commenced on the _____ day of _____, 19____, and ended on the _____ day of _____, 19____. [*If there have been adjournments, add*]: and deponent further says that the notice of postponement annexed to said notice was also published in said newspaper, on the _____ day of _____, 19____, and on the _____ day of _____, 19____, in the form shown in said annexed printed copy thereof.

[*Jurat*].

No. 57.

Affidavit of Serving Notice of Sale.

COUNTY OF _____, ss.:

_____, being duly sworn, says that he resides at _____, and is over twenty-one years of age; that on the _____ day of _____

19 , at , he served the annexed notice of sale of , by delivering to and leaving with him, personally, a true copy thereof.

That deponent served the annexed notice of sale on , by leaving a true copy thereof, which was legibly addressed to him, at his dwelling house, at , in the city of , in charge of a person of full age, who received the same for him.

That on the day of , 19 , he served the said annexed notice of sale upon each of the following named persons by depositing true copies thereof in the post-office at the city of , duly enclosed and sealed in a post-paid wrapper and directed to each of said persons at their respective places of residence, as follows: to , at ; to , at ; to , at ; that the postage on each of said notices was prepaid, and that the said persons were known to deponent to reside at the several places to which the notices to them were respectively directed.

[*Jurat*].

No. 58.

Affidavit of Fact of Sale.

COUNTY OF , ss.:

, being duly sworn, says that he resides at , in the city of , in the county of , and is over twenty-one years of age; that at , in the city of , in the county of , on the day of , 19 , at o'clock in the noon of that day, he officiated as auctioneer at the mortgage foreclosure sale of the premises described in the notice of sale, a printed copy of which is hereto annexed, pursuant to such notice, and by virtue of the power of sale contained in the mortgage, which is therein mentioned; that said sale took place at said time and place and that the whole of said premises were then and there sold in one parcel to S. R., for the sum of dollars, he being the highest bidder therefor, and that being the highest sum bidden for the same.

Deponent further says that such sale was at public auction, in the day time, and in all respects honestly, fairly and legally conducted, according to deponent's best knowledge and belief;

that the premises, so far as the same consist of separate tracts, farms or lots, were sold separately, and no more tracts, farms or lots were sold than were necessary to satisfy the amount claimed to be due on said mortgage at the time of such sale, together with the costs and expenses allowed by law; that the following is a description of the premises sold: [*Insert description*].

[*Jurat*].

No. 59.

Petition by Purchaser Under Foreclosure by Advertisement to Obtain Possession.

To the county judge of the county of _____ :

The petition of G. R., of _____, in the county of _____, respectfully shows:

That heretofore C. D., being the owner of the premises herein-after described, and being indebted to E. F., in sum of _____ dollars, upon his bond for that sum, dated the _____ day of _____, 19____, and payable in one year after that date, with interest thereon, payable semi-annually, executed, with M. D., his wife, duly acknowledged and delivered to the said E. F., a mortgage, to secure the payment of said bond, bearing even date therewith, and recorded in the office of the clerk of the county of _____, in book No. _____ of mortgages, at page _____, on the _____ day of _____, 19____, whereby they granted and conveyed unto the said E. F., the following described premises, to wit: [*Insert description*].

That said mortgage contained a like condition as the said bond, and that it also contained a power of sale, whereby in case of default in the payment of the said sum of money, the interest that might grow due thereon, or any part thereof, the said E. F., or his assigns, were duly empowered to sell said mortgaged premises in due form of law, and out of the moneys arising from the said sale, to pay the said sum of money and interest, with the costs and expenses of the proceedings thereupon, the surplus, if any, to be returned to the said mortgagor; (that thereafter the said E. F. duly assigned said bond and mortgage to H. O.); that thereafter default was made in the payment of the money secured by the said mortgage, whereupon the said E. F. commenced proceedings by virtue of said power of sale contained in said mortgage, and in pursuance of the statute in such case made and

provided, to foreclose the said mortgage, by a sale of the premises therein described, at public auction; that due notice of the time and place of such sale was given, in the manner required by law; and that thereafter, to wit: on the day of , 19 , the said premises were, under the said power of sale, duly sold to and purchased by your petitioner, for the sum of dollars, that being the highest sum bidden for the same; that the affidavits of publication and of affixing the notice of sale, and of the service of such notice, and of the circumstances of the sale, showing such foreclosure and the proceedings thereupon, and which affidavits are required by law to be made, were duly made, and that they were on the day of , 19 , duly filed in the office of the clerk of the county of , that being the county where the said mortgaged premises were and are situated, and where said sale took place; and that they were also on that day duly recorded at length by such clerk, in a book kept by him in said office for the record of mortgages, in book No. of mortgages, commencing at page ; that after the title to said mortgaged premises had been duly perfected in this petitioner, by the filing and recording of said affidavits, as aforesaid, this petitioner demanded possession of the said premises from the said C. D., who was then and is now in possession thereof, (*or* from J. H., who was then and is now in possession thereof, claiming to hold the same by some right or title derived from the said C. D., the said mortgagor, subsequently to the execution and delivery of said mortgage, by virtue of said title under said foreclosure); and that the said C. D. (*or* J. H.) refused, and still refuses to surrender said possession, and that he holds over and continues in possession of the said premises after the perfection of said title in said foreclosure proceedings and after such demand aforesaid, without permission of this petitioner, who is entitled to the possession thereof.

Your petitioner therefore prays for a final order to remove the said C. D. (*or* J. H.), and all persons holding under him from the possession of said premises, and for such other or further relief as may be just, together with the costs of this proceeding.

Dated the day of , 19 .

O. R., *Attorney for Petitioner.*

[*Add verification in the usual form*].

Mortg. Vol. II.—109.

No. 60.

Precept to be Issued on Foreign Petition.

Before the County Judge of county.

G. R.,	}	
<i>Petitioner,</i>		
<i>against</i>		
C. D. (<i>or</i> J. H.),		
<i>In Possession.</i>	}	

The People of the State of New York:

To C. D., (*or* J. H.), above named, and each and every person in possession of the premises hereinafter described:

You, and each of you, are hereby required forthwith to remove from the premises described as follows: [*Insert description*]; or to show cause before me, the county judge of the county of , at the courthouse, in the of , in the county of , aforesaid, on the day of , 19 , at o'clock, in the noon of that day, why the possession of said preimses should not be delivered to said petitioner.⁸

Dated the day of , 19 .

[*Signature of County Judge*].

No. 61.

Final Order in Summary Proceedings.

[*Title as in precept*].

The petitioner, G. R., having appeared on the day of , 19 , and the precept issued herein having then been returned with due proof of the service thereof, and the petitioner having then demanded possession of the premises described in his petition, which petition was dated and verified on the day of , 19 .

⁸ In New York, if the precept is served otherwise than personally, § 2241 of the Code of Civil Procedure, must be indorsed thereon.

And the respondent, C. D., in possession, having then also appeared by his attorney and filed his verified answer to said petition, and the issue thus made having been duly tried before the said county judge without a jury, who, after hearing the allegations and proofs of the parties, rendered his decision in favor of the petitioner.

Now, therefore, on motion of O. R., attorney for the petitioner, final order is hereby made in favor of said petitioner, awarding to said petitioner the delivery of the premises described in said petition, by reason of the facts therein alleged and set forth, together with the sum of dollars costs.

Dated the day of , 19 .

[Signature of County Judge].

No. 62.

Warrant to Obtain Possession in Summary Proceedings.

To the sheriff of the county of , or to any constable of said county of , Greeting:

Whereas, G. R., has heretofore presented to me his verified petition, alleging that heretofore C. D., being the owner of the premises hereinafter described, and being indebted to E. F. in the sum of dollars, upon his bond for that sum, dated on the day of , 18 , and payable in one year after said date with interest thereon payable semi-annually, executed, with M. D., his wife, acknowledged and delivered to said E. F. a mortgage, to secure the payment of said bond. [*Follow substantially the language of the petition in Form No. 59*].

Whereupon I issued a precept requiring the said C. D. (or J. H.), and each and every person in possession of said premises, forthwith to remove from the said premises, or to show cause before me, at a certain time now past, why the possession of said premises should not be delivered to the said G. R.; [*If an answer has been interposed and a trial had, recite the proceedings as in Form No. 61*], and no good cause having been shown, or in any way appearing to the contrary, and due proof of the service of such precept having been made to me, and I having made a final order awarding the possession of said premises to said petitioner, with the sum of dollars costs.

Now, therefore, in the name of the People of the state of New

York, you are hereby commanded to remove all persons from said premises, and to put the said G. R. into the full possession thereof.

In witness whereof, I have subscribed these presents this
day of , 19 .

[*Signature of County Judge*].

No. 63.

Sheriff's or Constable's Return Upon the Warrant.

Pursuant to the command of the within warrant, I have this day put the said G. R. into the full possession of the premises therein mentioned.

Dated the day of , 19 .

[*Signature of Sheriff or Constable*].

[*To be indorsed on the preceding warrant*].

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